



San Francisco Law Library

No.

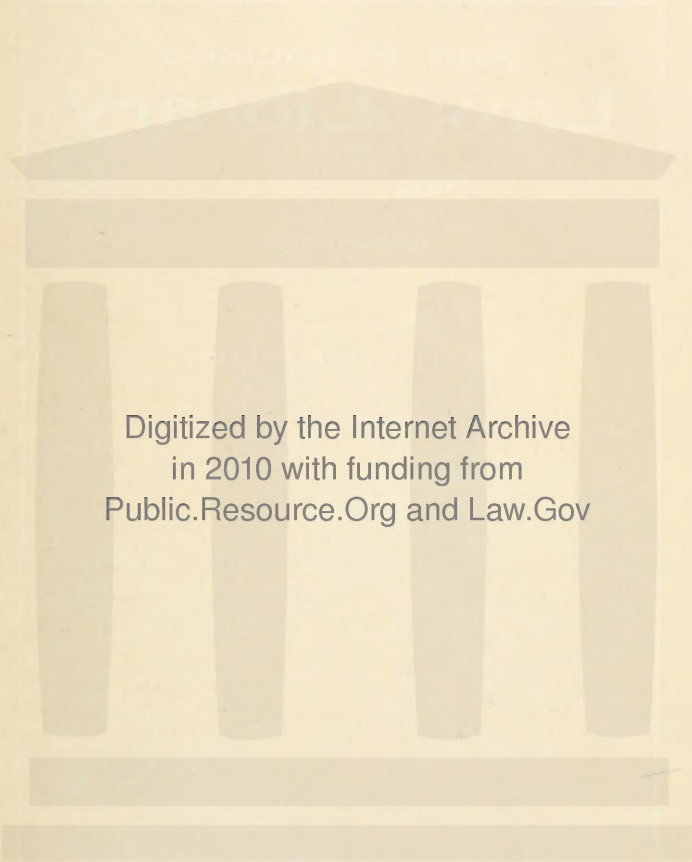
Presented by

.....

EXTRACT FROM BY-LAWS.

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. A party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

16 857
856
No. 2361

United States
Circuit Court of Appeals
For the Ninth Circuit.

CONNELL BROTHERS COMPANY, a Corpora-
tion,

Plaintiff in Error,

vs.

H. DIEDERICHSEN & COMPANY,

Defendant in Error.

Transcript of Record.

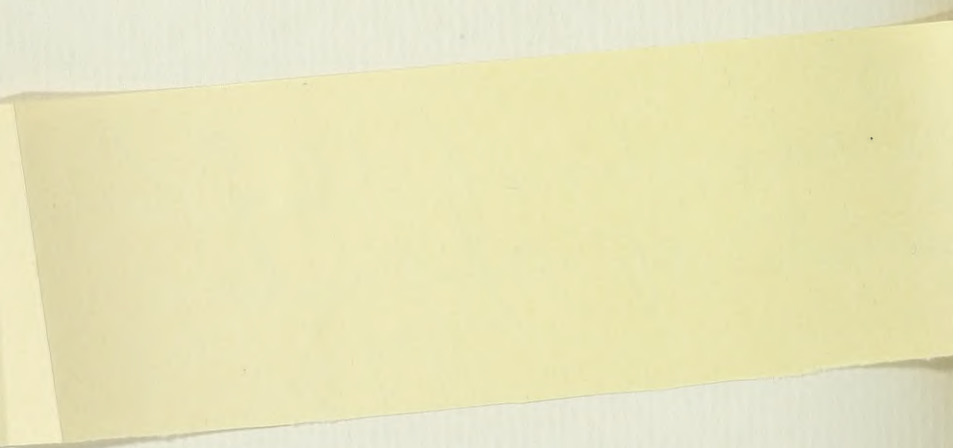
Upon Writ of Error to the United States
Court for China.

FILED

FEB 14 1914

Records of U.S. Circuit
Court of appeals

857



United States
Circuit Court of Appeals
For the Ninth Circuit.

CONNELL BROTHERS COMPANY, a Corpora-
tion,

Plaintiff in Error,

vs.

H. DIEDERICHSEN & COMPANY,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States
Court for China.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Answer.....	6
Assignment of Errors.....	271
Bill of Exceptions.....	10
Bond on Writ of Error.....	280
Certificate of Clerk United States Court for China to Transcript of Record.....	283
Citation on Writ of Error (Copy).....	278
DEPOSITIONS ON BEHALF OF PLAINTIFF:	
ANDERSON, THOMAS.....	17
Cross-examination....	21
Redirect Examination.....	23
BIBB, JOHN T.....	37
Cross-examination....	38
Redirect Examination.....	40
HAINES, A. S.....	24
Cross-examination....	26
Redirect Examination.....	34
TUTTLE, FREDERICK.....	12
Cross-examination....	15

	Index.	Page
DEPOSITIONS ON BEHALF OF DEFEND-		
ANT:		
BAUMANN, L. P.....		73
Cross-examination.....		82
Redirect Examination.....		84
CONNELL, M. J.....		56
Cross-examination.....		67
Redirect Examination.....		70
Recross-examination.....		72
OSTRANDER, H. F.....		44
EXHIBITS:		
Plaintiff's Exhibit "A".....		41
Plaintiff's Exhibit "B"—Translation of		
Code Telegram, Dated April 8, 1912....		182
Plaintiff's Exhibit "C"—Translation of		
Code Telegram Dated April 17, 1912....		183
Plaintiff's Exhibit "D"—Protest of Messrs.		
H. Diederichsen & Co., Dated April 10,		
1912.....		183
Plaintiff's Exhibit "E"—Statement of Ac-		
count.....		185
Plaintiff's Exhibit "F"—Statement of Ac-		
count.....		185
Plaintiff's Exhibit "G"—Statement of Ac-		
count.....		185
Plaintiff's Exhibit "H"—Contract.....		186
Plaintiff's Exhibit "I"—Statement of Ac-		
count.....		187
Defendant's Exhibit No. 1—Export Bill of		
Lading No. 6564.....		41

Index.

Page

EXHIBITS—Continued:

Defendants' Exhibit No. 3—Copy of Telegram from H. F. Ostrander to Parrott & Co., December 7, 1911.....	86
Defendant's Exhibit No. 4—Copy of Telegram from Parrott & Co. to H. F. Ostrander December 7, 1911.....	86
Defendant's Exhibit No. 5—Letter Dated December 7, 1911—Parrott & Co. to H. F. Ostrander.....	86
Defendant's Exhibit No. 6—Translation of Code Telegram, December 26, 1911....	87
Defendant's Exhibit No. 7—Translation of Code Telegram, December 27, 1911.	88
Defendant's Exhibit No. 8—Translation of Code Telegram, December 27, 1911....	88
Defendant's Exhibit No. 9—Translation of Code Telegram, December 28, 1911....	89
Defendant's Exhibit 9a—Translation of Code Telegram, December 28, 1911....	90
Defendant's Exhibit No. 10—Translation of Code Telegram, December 29, 1911..	91
Defendant's Exhibit No. 11—Translation of Code Telegram, December 29, 1911..	92
Defendant's Exhibit No. 12—Letter from the East Asiatic Company, Ltd., to H. F. Ostrander.....	92
Defendant's Exhibit No. 13—Letter (Unsigned) Dated January 15, 1912, to Messrs. Parrott & Co.....	94
Defendant's Exhibit No. 14—Two Letters	

	Index.	Page
EXHIBITS—Continued:		
from Parrott & Co. to H. F. Ostrander..		95
Defendant's Exhibit No. 15—Letter Dated Tacoma, April 11, 1912—Canfensly to H. F. Ostrander		96
Defendant's Exhibit No. 16—Letter Dated San Francisco, December 27, 1911—L. R. Cofer to Messrs. Connell Bros. & Company		97
Defendant's Exhibit No. 17—Letter Dated Seattle, December 30, 1911—C. L. La Grave to Messrs. Connell Bros. & Co... .		99
Defendant's Exhibit No. 18—Letter Dated October 14, 1911—Connell Bros. Company to Centennial Mill Company.... .		100
Defendant's Exhibit No. 19—Letter Dated Seattle, October 16, 1912—Centennial Mill Company to Messrs. Connell Bros. Co.		101
Defendant's Exhibit No. 20—Acknowledgment of Order.... .		102
Defendant's Exhibit No. 21—Invoice of Flour..... .		103
Defendant's Exhibit No. 22—Steam Charter-party..... .		103
Defendant's Exhibit "A-1"—Tabulated Statement.... .		248
First Exception..... .		43
Fourth Exception		114
Fifth Exception..... .		249

Index.	Page
Opinion and Judgment June 9, 1913.....	250
Opinion and Judgment November 4, 1913.....	260
Order Allowing Writ of Error.....	275
Order Approving, Allowing and Settling Bill of Exceptions....	250
Order Extending Time to File Record in Cir- cuit Court of Appeals.....	279
Petition.....	2
Petition for Writ of Error..	270
Praecipe for Transcript	282
Second Exception....	113
Statement.....	1
Stipulation as to Hearing and Determination of Cause....	10
Stricken Portions of Deposition of L. P. Baumann..	113
Stricken Portions of Deposition of M. J. Con- nell....	112
TESTIMONY ON BEHALF OF PLAIN- TIF:	
FUNG, LU CHI	175
Cross-examination.....	178
Redirect Examination	180
Recross-examination....	181
GRAEBER, A.	115
Cross-examination	142
Redirect Examination....	152
Recross-examination	154
SHEN, HO LIEN....	157
Cross-examination....	170

Index.	Page
TESTIMONY ON BEHALF OF DEFEND-	
ANT:	
BIRTT, WILLIAM H.	229
Cross-examination	239
Redirect Examination	242
Recross-examination	243
CONNELL, J. J.	187
Recalled	216
Cross-examination....	217
EMENS, W. S.	244
REID, DR. GILBERT.....	212
Cross-examination	214
Redirect Examination	215
Recross-examination	215
Third Exception.....	114
Writ of Error (Copy) ..	276

Shanghai,
China,—ss.

Record of proceedings of United States Court for
China in the cause and matter hereinafter
stated, the same being disposed of during a
regular term of said Court held at the city of
Shanghai, China, to wit, on the fourth day of
November, 1913. Present, the Honorable
RUFUS H. THAYER, Judge of the United
States Court for China.

[Statement.]

Civil Action No. 118.

AT LAW.

H. DIEDERICHSEN & COMPANY,

Plaintiffs,

vs.

CONNELL BROTHERS COMPANY, a Corpora-
tion,

Defendant.

Said action was commenced on December third,
1912, and proceeded to final disposition on the day
above written, and during the progress thereof
pleadings and papers were filed, process was issued
and returned and orders of the Court were made and
entered in the order and on the dates hereinafter
stated, to wit: [1*]

*Page-number appearing at foot of page of original certified Record.

In the United States Court for China.

Civil Action No. 118.

Original Paper No.—.

Filed at Shanghai, Dec. 3, 1912. James B. Davies,
Clerk of Court.

H. DIEDERICHSEN & COMPANY,

Plaintiff,

vs.

CONNELL BROTHERS COMPANY,

Defendant.

Petition.

The plaintiff herein respectfully shows to the Court and alleges as follows:

1. That the plaintiff is a German firm or company doing business at Chefoo and Shanghai, China, and elsewhere.

2. That as plaintiff is informed and believes the defendant is a corporation incorporated under the law of some State of the United States at present unknown to plaintiff and having an office and place of business at Shanghai, China within the jurisdiction of this Honorable Court.

3. That on or about the 17th day of October, 1911, at Chefoo, China, the plaintiff entered into a written contract with the defendant, which will be produced in evidence, whereby plaintiff purchased from defendant eighty thousand sacks of flour.

4. That by the terms and condition of said contract the defendant undertook and agreed to ship the said eighty thousand sacks of flour from either the

ports of Seattle, Tacoma, Portland or San Francisco, in the United States, or the port of Vancouver, in Canada, by a steamer sailing from any of said ports during the month of February, 1912, and consigned to plaintiff at Chefoo, China. [2]

5. That defendant utterly and wholly failed to carry out and perform the conditions of said contract as to time of shipment and without notice, in due time, to the plaintiff or the knowledge, in due time, and consent of plaintiff shipped the aforesaid eighty thousand sacks of flour by the S. S. "Harpagus," which as plaintiff is informed and believes sailed from Puget Sound on or about the 14th day of March, 1912.

6. That upon arrival of the cargo at Chefoo plaintiff accepted delivery of the aforesaid flour under protest in order to mitigate the loss which might follow upon a refusal to receive the flour.

7. That prior to the arrival of the flour as aforesaid plaintiff has resold seventy-five thousand sacks of the total quantity of flour to various Chinese merchants.

8. That by reasons of the failure of defendant to ship the aforesaid flour by steamer sailing from the aforesaid ports in the month of February, 1912, as agreed, the plaintiff was unable to make delivery to the aforesaid Chinese merchants in accordance with plaintiff's contract with said merchants, and because of the delay in shipment as aforesaid and the resulting inability of plaintiff to make delivery as aforesaid the said Chinese merchants cancelled their contract with plaintiff and refused to accept

delivery of the flour upon its arrival, and plaintiff was compelled to sell said flour in the open market at the then prevailing market price at heavy loss.

9. That by reasons of the breach of contract on the part of defendant as aforesaid plaintiff has suffered great damage, to wit, the amount of Chefoo Taels, Thirty Thousand Six Hundred and Eighty-six and Cents Forty-four Tls. 30,686.44), as more particularly appears from the bill of particulars hereunto appended. [3]

10. That plaintiff has demanded payment from the defendant of the sum aforesaid but defendant has refused and still refuses to pay all or any part thereof.

WHEREFORE plaintiff demands judgment against defendant in the sum of Chefoo taels 30,686.44, together with interest and the costs of this action, and for such other and further relief as to the Court may seem meet.

Dated November sixteenth, 1912.

A. GRAEBER.

Chefoo, China.

On this 16th day of November, 1912, before me personally appeared Mr. A. Graeber, known to me to be the manager of H. Diederichsen & Co., Chefoo, China, who being by me duly sworn did depose and say that he is the manager of H. Diederichsen & Co. of Chefoo, the plaintiff herein; that he has read the foregoing petition and knows the contents thereof, and the same is true of his own knowledge except as to those matters therein alleged upon information

and *believe*, and as to those matters he believes is to be true.

Sworn to before me this 16th day of November, 1912.

[Seal of the American Consulate General Chefoo, China.]

CHARLES H. WILLIAMS,
American Deputy Consul.

BILL OF PARTICULARS.

80,000 sacks of flour (of which 75,000 sacks were sold as per contract to Chinese dealers) at U. S. Gold \$4.25 per 4 sacks @ Ex. 58—Shanghai.

Tls. 1,832 per sack.....	Shanghai Tls. 146,560
at the exchange of 1040..	Chefoo Tls. 140,923.08
Sold for.....	“ “ 117,121.76

Loss.... . Chefoo Tls. 23,801.32

[4]

Interest paid to bank.....	Chefoo Tls. 3,626.36
Insurance.....	“ “ 370.80
Storage.....	“ “ 592.78
Lighterage for landing \$1600—	
@ 71.....	“ “ 1,136.
Coolie hire for landing \$800—	
@ 71.....	“ “ 568.
Matting for storing purposes	
\$85.80 @ 71.....	“ “ 60.92
Consular protest \$70.40 @ 71...	“ “ 49.98
As per enclosed letter Gold \$350	
@ 72 $\frac{7}{8}$	“ “ 480.28

Chefoo Tls. 30,686.44

[5]

In the United States Court for China.

Civil Action No. 118.

Original Paper No.—.

Filed at Shanghai, Jan. 3, 1913. James B. Davies,
Clerk of Court.

H. DIEDERICHSEN & COMPANY,

Plaintiffs,

vs.

CONNELL BROTHERS COMPANY, a Corpora-
tion,

Defendant.

Answer.

Now comes the defendant herein and answering the petition of the plaintiffs on file herein, says:

1st.

Defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph One of said petition, and therefore leaves the plaintiffs to their proof thereof.

2d.

Defendant admits that it is a corporation and that it has an office and place of business at Shanghai, China, and within the jurisdiction of this Honorable Court; and defendant alleges that it is incorporated under and by virtue of the laws of the State of Washington, United States of America, and that its principal offices and place of business is at Seattle in said State.

3d.

Defendant admits that on or about the 17th day of October, 1911, at Chefoo, China, the plaintiffs and the defendant entered into a written contract whereby the plaintiffs purchased from the defendant eighty thousand sacks of flour, but alleges that the terms and conditions of said contract have not been fully stated and set forth [6] in plaintiffs' petition. Annexed hereto and made a part hereof marked Exhibit "A" is a copy of said contract.

4th.

Defendant admits that by the terms and conditions of said contract the defendant undertook to ship the said eighty thousand sacks of flour from either the ports of Seattle, Tacoma, Portland, or San Francisco, in the United States of America, or the port of Vancouver, in Canada, by a steamer sailing from any of said ports during the month of February, 1912, and consigned to the plaintiffs at Chefoo, China; but alleges that under the terms and conditions of said contract it was further agreed by and between the plaintiffs and the defendant that the terms and conditions contained in or implied by said contract should be contingent upon strikes, accidents and other delays unavoidable or beyond the control of the defendant.

5th.

Answering Paragraph Five of said petition defendant admits that it shipped to the plaintiffs said eighty thousand sacks of flour by the S. S. "Harpagus"; and defendant alleges that said flour was delivered to Messrs, Dodwell and Company, of Ta-

coma, Washington, U. S. A., the agents for said steamship, upon the wharf by the side of which the said steamship was moored, for shipment by said steamship not later than the 28th day of February, 1912, and that bills of lading covering said shipment were issued to defendant by said Messrs. Dodwell and Company, agents, as aforesaid, prior to or on said 28th day of February, 1912. Defendant has no knowledge or information sufficient to form a belief as to the truth of the allegation contained in said Paragraph Five of said petition [7] that said steamship sailed from Puget Sound on the 14th day of March, 1912, and therefore leaves the plaintiffs to their proof thereof. But defendant alleges that if said steamship did not sail from said port of Tacoma prior to or on the 28th day of February, 1912, and was delayed until the 14th day of March, 1912, or until any other date after said 28th day of February, 1912, then such delay was due to strikes, accidents or other relays unavoidable or beyond the control of the defendant. Defendant denies each and every other allegation contained in said Paragraph Five of said petition.

6th.

Defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs Six, Seven and Eight of said petition, and leaves the plaintiffs to their proof thereof.

7th.

Defendant denies each and every allegation contained in Paragraph Nine of said petition.

WHEREFORE defendant prays for judgment that plaintiffs' petition herein may be dismissed and for costs.

Dated: Shanghai, January 2d, 1913.

CONNELL BROTHERS COMPANY,

By J. J. CONNELL,

Its Attorney in Fact.

FLEMING & RICE,

Counsel for Defendant.

Shanghai,

China,—ss. [8]

J. J. Connell, being first duly sworn, deposes and says: That he is the attorney in fact for Connell Brothers Company, a corporation, and that he is in charge of the office and business of said Connell Brothers Company in China; that he has read the above and foregoing answer to the petition of the plaintiffs herein and knows the contents thereof; and that the same is true to the best of his knowledge, information and belief.

J. J. CONNELL.

Subscribed and sworn to before me this 3d day of January, 1913.

[Seal of the United States Court for China.]

JAMES B. DAVIES,

Clerk. [9]

In the United States Court for China.

Civil Action No. 118.

Original Paper No.—.

Filed at Shanghai, Nov. 6, 1913. Edward H. Murray, Acting Clerk of Court.

H. DIEDERICHSEN & COMPANY,

Plaintiffs,

vs.

CONNELL BROTHERS COMPANY, a Corporation,

Defendant.

Bill of Exceptions.

Be it remembered that the plaintiffs and the defendant in the above-entitled cause, through their respective attorneys on the 27th day of May, 1913, entered into the following stipulation with reference to the trial and determination of the issues raised by the pleadings in this cause, that said stipulation was approved by the Judge of the above-entitled court and filed on the 29th day of May, 1913. Said stipulation is as follows, to wit:

Stipulation [as to Hearing and Determination of Cause].

“STIPULATION.

IT IS HEREBY STIPULATED AND AGREED by and between the plaintiffs and the defendant herein that the above-entitled case may be heard tried and determined by the Court in the manner following, to wit:

1st. That the hearing and trial of said action be

confined in the first instance as to the issue whether or not the defendant herein has committed a breach of the contract mentioned in the pleadings herein as to shipment or has committed such a breach of the contract as to shipment as will render it liable in damages to [10] the plaintiffs if damages have in fact been sustained by the plaintiffs. And that if said Court should hold, find and decide that the defendant had not committed a breach of said contract or such a breach of the same as would render it liable in damages to the plaintiffs then that such judgment be made final.

2d. That in event the Court should hold, find and decide that the defendant had committed such a breach of the said contract as would render it liable if damages had in fact been sustained by the plaintiffs herein by reason thereof, then the above-entitled matter shall be again set for hearing on the issue of damages and that evidence in relation thereto both on behalf of the plaintiffs and on behalf of the defendant may be offered and introduced by the respective parties and after a full hearing and argument thereon, the final judgment and finding of the court be made and entered herein."

Be it further remembered that thereafter on the 31st day of May, 1913, this cause came on for trial in said Court at Shanghai, China, under the stipulation aforesaid and for the hearing, submission and determination by the Court of the issues mentioned in the first paragraph of said stipulation, Messrs. Jernigan & Fessenden appearing as counsel for the plaintiffs and Messrs. Fleming & Davies appearing as counsel

for the defendant, and the following proceedings were had, to wit:

The plaintiffs offered in evidence the depositions of Frederick Tuttle, Thomas Anderson, A. S. Haines, and John T. Bibb. Said depositions having been taken at Tacoma, Washington, U. S. A., before the Clerk of the Superior Court of Pierce County, Washington, under stipulation of the plaintiffs and the defendant and [11] the plaintiffs being represented at the taking of said depositions by R. S. Holt, Esq., and the defendant being represented by J. A. Kerr, Esq. Said depositions and the exhibits attached thereto being as follows, to wit:

[Deposition of Frederick Tuttle, for Plaintiff.]

FREDERICK TUTTLE, called and sworn as a witness for the plaintiff, testified as follows:

Direct Examination.

(By Mr. HOLT.)

Q. Mr. Tuttle, state your name, residence and occupation.

A. Frederick Tuttle; 1426 North Anderson street; bookkeeper.

Q. North Anderson street, Tacoma?

A. Yes, sir.

Q. By whom are you employed at the present time? A. International Stevedoring Company.

Q. What business are they engaged in?

A. Loading and discharging of cargo on steamers and sailing vessels.

Q. What were you doing during the months of February and March, 1912?

(Deposition of Frederick Tuttle.)

A. I was in the employ of the Stevedoring Company as cashier and bookkeeper.

Q. What were your general duties with reference to the loading and keeping track of the loading of ships?

A. It is to keep track of the payrolls, the paying off of our employees, and getting the particulars of all the cargo loaded and discharged, invoicing the same and collecting the accounts.

Q. Do you remember, Mr. Tuttle, about the ship "Harpagus" which was loaded in March, 1912?

A. Yes, sir.

Q. Who loaded her? I have reference to the concern, [12] what company put on her cargo?

A. International Stevedoring Company.

Q. Were you cognizant with the circumstances, time and so forth?

A. Yes, sir; I was in the office and handled the accounts.

Q. Can you tell us on what day the "Harpagus" on that voyage landed at the port of Tacoma?

A. Yes, sir, she landed on the 29th of February, 2:30 in the afternoon.

Q. Who docked her?

A. Our foreman was there, Mr. Quilhough.

Q. I suppose you knew of it?

A. Yes, sir, I knew of her arrival.

Q. At what dock did she first land?

A. Tacoma Grain Company.

Q. Did she take on any cargo there?

A. Yes, sir.

(Deposition of Frederick Tuttle.)

Q. When did she begin to take on that cargo, and what was the cargo?

A. She commenced taking cargo at 7:30, March 1st, loading flour.

Q. 7:30 A. M.? A. Yes, sir.

Q. How long did she continue doing so, Mr. Tuttle?

A. She worked that day until 10 o'clock at night. On the second and following day she worked from 7 to 5. That is all at that dock.

Q. Was that taking flour? A. Yes, sir.

Q. Do you know to whom that flour was consigned, or anything about that? A. No, sir. [13]

Q. You know nothing about that? A. No, sir.

Q. Was this flour the first cargo she took on?

A. The first cargo in Tacoma.

Q. Where did she go next?

A. She went to the Northern Pacific Oriental Dock.

Q. What cargo did she take on there?

A. She commenced loading on flour, fish and cotton.

Q. Do you know how long she remained at Tacoma on that trip?

A. Yes, sir, she was through on March 7th.

Q. Mr. Tuttle, I now show you a slip marked "The Washington Stevedore Co., Inc., Tacoma, Feb. 29, 190—, Ship 'Harpagus,' taking lines," with the names of C. Ness, C. A. Spencer and O. Anderson thereon, and ask you in whose handwriting that is.

A. Mr. J. Quilhough.

(Deposition of Frederick Tuttle.)

Q. Do you know his handwriting?

A. Yes, sir.

Q. From having seen him write? A. Yes, sir.

Q. Who was he? A. He is our foreman.

Q. On February 29th, 1912? A. Yes, sir.

Q. What does that slip represent?

A. Represents the receiving of the lines from the steamer in order that she can be secured to the dock.

Q. To what time does that slip relate?

A. Arriving at 3:30, February 29th and taking one hour to receive the lines and dock the ship.

Q. Do you know when that slip was made out?

A. Yes, sir, it was made out on that date. [14]

Q. In whose custody has it been since then?

A. Mine.

Mr. HOLT.—I now offer this slip in evidence, to be marked as Plaintiff's Exhibit "A."

Thereupon said document was marked Plaintiff's Exhibit "A."

Cross-examination.

(By Mr. KERR.)

Q. Mr. Tuttle, when did the "Harpagus" leave Tacoma?

A. I could not tell you the exact time.

Q. What time did you complete the loading of her Tacoma cargo?

A. At 6:30 P. M. March 7th we finished her.

Q. I notice you have been testifying from memoranda; did you make that memoranda at the time?

A. No, sir—at that time?

(Deposition of Frederick Tuttle.)

Q. Yes.

A. These memorandums were made by our foreman who had the loading of the ship.

Q. You did not make them? A. No, sir.

Q. Were you present when she was docked?

A. I was in the office, not at the mill.

Q. Where is your office from the mill?

A. In the Pacific Cold Storage building; it is three hundred yards away, I should say.

Q. You personally did not make any memorandum of the date of the arrival?—

A. Yes, sir.

Q. In Tacoma? A. Yes, sir.

Q. Do you think that was March 1st?

A. The 29th of February?

Q. I mean the 29th of February? [15]

A. Yes, sir, I am positive on that, I have it in my office records which I looked up before coming here.

Q. Do you know where she came from?

A. No, sir.

Q. She completed her loading on the 7th?

A. Yes, sir.

Q. Do you know where she went from Tacoma?

A. No, sir.

Q. Do you know how much flour she took on at the Tacoma Grain Company's dock? A. No, sir.

Q. Approximately? A. No, sir.

Q. Or how much flour she took on at the Oriental Dock?

A. No, sir; I have the total amount loaded in Tacoma, but not with me.

(Deposition of Frederick Tuttle.)

Q. Of flour? A. Yes, sir.

Q. How much was it?

A. I could not tell you without looking at my record which I have in the office. My invoices show.

Q. Did you see the "Harpagus" come in? Did you see her when she came into the harbor?

A. I could not say that I did, sir, no.

Q. You do not know whether she moored when she came into the harbor or whether she was docked at the Tacoma Grain Company's dock on arrival?

A. Yes, sir.

Q. You know she was docked there on the 29th on her arrival? A. Yes, sir.

FREDERICK TUTTLE. [16]

[Deposition of Thomas Anderson, for Plaintiff.]

THOMAS ANDERSON, called and sworn as a witness for the plaintiff, testified as follows:

Direct Examination.

(By Mr. HOLT.)

Q. State your name, residence and occupation, Mr. Anderson.

A. Thomas Anderson; 2007 South K.

Q. What is your business, Mr. Anderson?

A. Longshoreman.

Q. Do you remember the steamship "Harpagus" taking a cargo here in March, 1912?

A. Yes, sir, I do.

Q. Did you have anything to do with the loading of that cargo?

A. Yes, I was foreman of the cargo—loading the cargo at the time.

(Deposition of Thomas Anderson.)

Q. In whose employ were you at the time?

A. Washington Stevedore Company; it is not the International Stevedoring Company.

Q. Were you present, Mr. Anderson, when that ship arrived in Tacoma and when she was docked?

A. No, sir, I was not when she docked.

Q. How long after she was docked was it when you first knew of her being in?

A. I don't know; she was in at half-past four,—something like that,—when I came down there.

Q. When you came down it was about half-past four? A. Yes, sir.

Q. Was there any freight on her at that time?

A. No, sir.

Q. Do you know how long she had been docked at that time?

A. No, I could not exactly say, I don't remember.
[17]

Q. Do you know which of your men docked her, putting out the lines?

A. Yes, some of my men there took the lines.

Q. On what date? A. The 29th.

Q. Of February?

A. Of February, yes, sir.

Q. Now, Mr. Anderson, you say you superintended the loading of her cargo? A. Foreman, yes, sir.

Q. As foreman. On what day did you commence to load the cargo on that voyage?

A. Seven o'clock in the morning we started—started putting flour on at 7:30.

Q. What date? A. The 1st of March.

(Deposition of Thomas Anderson.)

Q. At what dock or warehouse was this flour taken on? A. Tacoma Grain.

Q. Was that the first cargo put on that ship?

A. Yes, sir.

Q. Did you continue to load her with the cargo that she took on at Tacoma?

A. Yes, sir, kept right on.

Q. You have no means of knowing how much flour?

A. No, sir, I could not tell you how much flour; I cannot remember,—too far back.

Q. How long did she stay at the Tacoma Grain Company's warehouse?

A. Well, it was 10 o'clock that first day and 5 the next, that is, the 3d when we finished up—the 2d.

Q. Was she taking on flour all that time?

A. Yes, sir.

Q. Where did she go next, Mr. Anderson?

A. Oriental Dock. [18]

Q. That is the Northern Pacific dock?

A. Yes, sir.

Q. What cargo did she take on there?

A. Well, took on flour, for my part, the first day, and took on cotton the second day.

Q. What was taken on afterwards?

A. The last time I worked was taking on logs and lashing the deck.

Q. Was there any other flour loaded on her at that time in Tacoma harbor except what you put on?

A. Not that I know of.

(Deposition of Thomas Anderson.)

Q. After you got through loading her what did she do?

A. Well, she lashed the deck load and finished up that day.

Q. What did she do then?

A. She left the dock, if I am not mistaken, the forenoon the day after she left the dock and went out.

Q. And went out? A. Yes, sir.

Q. Do you remember whether you were present when she sailed?

A. I could not say whether I was on the dock when she left or not, I could not say exactly. I know she left in the forenoon some time, but I don't think I was at the dock.

Q. You cannot remember the time? A. No, sir.

Q. Can you say she did leave that day?

A. Yes, she left that day.

Q. I suppose you were down at the dock the following days and right along? A. Yes, sir.

Q. If she had been there you would have seen her?
[19]

A. Yes, sir.

Q. Did you make any memorandum, any writing, at the time with reference to the men engaged in the loading of this cargo and the time they worked?

A. The time they worked, yes, sir—when they started and when they quit.

Q. And the names also? A. Yes, sir.

Q. And the intermissions? A. Yes, sir.

Q. I now show you some tickets headed "The Wash-

(Deposition of Thomas Anderson.)

ington Stevedore Company, Inc., Tacoma, March 1, 190—, Ship 'Harpagus', Flour, and similar tickets for March 2d, 3d, 4th, 5th, 6th, and 7th.

(Witness examines tickets.)

Q. Have you examined the papers I have shown to you, Mr. Anderson?

A. Yes, sir, I have looked over them, yes.

Q. In whose handwriting are they?

A. They are mine.

Q. Are they true and correct? A. Yes, sir.

Q. At what time with reference to the time when the work was performed were they made?

A. I generally make them out in the morning and mark them up at night when we quit at night.

Q. Do these tickets contain the time the men worked and the date which they worked and the time they worked in loading this cargo? A. Yes, sir.

Q. They are correct in that respect?

A. Yes, sir.

Mr. HOLT.—I now offer these tickets and ask that they [20] be attached and become a part of Plaintiff's Exhibit "A."

Thereupon said tickets were attached to Plaintiff's Ex. "A."

Cross-examination.

(By Mr. KERR.)

Q. Mr. Anderson, did you make up these tickets the day the work was performed, or did you make them up the following day for the day previous?

A. The day I am working.

Q. Did you make this memoranda in the morning

(Deposition of Thomas Anderson.)

before the men went to work, or in the evening?

A. Before they went to work, and before they quit I marked the hours down they worked.

Q. The one that shows the names of certain stevedores under date of March 1st represents the hours they worked on that day, and not the day preceding?

A. No, sir, the work they done that day, up to 5 o'clock, and then we marked a new sheet if we worked overtime.

Q. How many hours on March 3d were your men engaged in loading flour at the Oriental Dock, all day or part of the day?

A. I could not remember it; I could not remember the hours we worked.

Q. You do not know when you shifted from the loading of flour to the loading of cotton?

A. I could not tell you that.

Q. But you loaded flour on the 1st, 2d and 3d?

A. Yes, sir.

Q. At least, a part of the 3d?

A. At least, a part of the 3d.

Q. Then you loaded cotton and logs after that?
[21]

A. I finished up the cotton, and the last day I loaded the logs.

Q. The only days you took in flour cargo was the 1st, 2d and 3d? A. Yes, sir.

Q. All put in during these three days?

A. Yes, as near as I can think of it.

Q. You do not know whether you worked all day the 3d putting in flour or not?

(Deposition of Thomas Anderson.)

A. No, I could not say.

Q. You do not remember any of the marks on the flour at either place indicated where it was going?

A. No, it is too far back, I could not remember it.

Q. At how many hatches did you load?

A. That is another thing pretty hard to say; I don't like to say anything I cannot remember. No. 2 was started and then we went to No. 3 and then back to No. 2 the third day.

Q. Was this flour located forward or aft in the ship? A. In the forward hold.

Q. The flour was in sacks or barrels?

A. Sacks.

Redirect Examination.

(By Mr. HOLT.)

Q. At the Oriental Dock were there any other foremen superintending the loading besides you?

A. Yes, Jack Quilhough is superintendent of the loading.

Q. Was he the superintendent ahead of you?

A. Yes, he is the head foreman.

Q. About the 1st, 2d and 3d, did they work all that time at one place, or did they shift?

A. The 1st and 2d they worked one place.

Q. At which warehouse? [22]

A. The Tacoma Grain.

Q. The other was where?

A. The 3d we went to the Northern Pacific Dock.

Q. Known as the Oriental Dock?

A. Oriental Dock.

THOMAS ANDERSON.

[Deposition or A. S. Haines, for Plaintiff.]

A. S. HAINES, called and sworn as a witness for the plaintiff, testified as follows:

Direct Examination.

(By Mr. HOLT.)

Q. Mr. Haines, state your name, age, residence and occupation.

A. A. F. Haines, residence—street address, you mean?

Q. No. A. Tacoma, Washington.

Q. Age?

A. Age, 41; occupation, general freight agent.

Q. Were you connected with Dodwell & Company in the year 1912? A. I was.

Q. In what capacity, Mr. Haines?

A. In the same capacity as at present.

Q. What is that?

A. General freight agent for them.

Q. And in a very general way what are your duties in connection with that position?

A. Supervising the engagement of cargo and the loading of steamers, the issuing of bills of lading, the carrying on of correspondence, and, etc.

Q. Do you know the ship "Harpagus"? [23]

A. Yes, sir.

Q. To whom does she belong?

A. J. and C. Harrison; I am not sure about that.

Q. Did Dodwell & Company have any control over her during the year 1912 at any time?

A. Yes, sir, we loaded her for owners account from Puget Sound to Chefu and Taku.

Q. Do you know where that ship was on the 29th

(Deposition of A. S. Haines.)

day of February, 1912?

A. She was at Tacoma.

Q. Do you know when she came to Tacoma?

A. On that date.

Q. Do you know how long she remained at Tacoma? A. Until March 8th.

Q. Do you know where she went when she left Tacoma?

A. To Vancouver, B. C., then to Comax, Vancouver Island, thence to Japan.

Q. Can you tell me when she left Vancouver?

A. March 12th.

Q. And when she left Comax? A. March 13th.

Q. Involved in this action in which these depositions are being taken is certain flour which was supposed to be shipped on the "Harpagus," marked "Morjon," a shipment of Connell Brothers Company to Diederichsen & Company at Chefu, China. Did you have any knowledge or connection with that shipment of flour?

A. Yes, I recognize that as a part of the cargo of the "Harpagus" on the voyage mentioned.

Q. Can you tell from what warehouse or docks that flour was loaded on the "Harpagus"?

A. From either the Tacoma Grain Company's dock—warehouse, rather, the Sperry Flour Company's dock, or [24] the Northern Pacific Ocean Dock No. 1.

Q. Do you know when they commenced to load that flour on to the "Harpagus"; I mean, on what date?

(Deposition of A. S. Haines.)

A. The steamer commenced loading flour on March 1st.

Q. Was that the first cargo she took on that trip to this part?

A. I could not say that offhand.

Q. But that was the first flour?

A. She loaded flour continuously for a couple of days.

Q. But she commenced loading flour on March 1st? A. Yes, sir.

Q. I notice the bill of lading issued bears date the 28th of February. As a matter of fact, was the ship in the harbor at that time at Tacoma?

A. She was on Puget Sound.

Q. But not in Tacoma?

A. No, she was at the Government Naval Station a few miles up the West Passage, where she discharged a cargo of coal.

Mr. HOLT.—I believe that is all.

The WITNESS.—I might state, Mr. Holt, if it is permissible. You mentioned that the bill of lading is dated February 28th; while the steamer was not in the harbor until March 1st, it is customary and usual to issue bills of lading in exchange for shipping receipts. That was of course the case, and it explains the discrepancy between the arrival of the steamer and the date of the bill of lading.

Cross-examination.

(By Mr. KERR.)

Q. Mr. Haines, I call your attention to what purports to be a duplicate copy of bill of lading issued

(Deposition of A. S. Haines.)

by Dodwell & Co. under date of February 28, 1912, for this cargo of flour consisting of eighty thousand [25] sacks, and ask you if that is a copy of the bill of lading. A. It is.

Q. That bill of lading recites as follows: "Received from Centennial Mill Company in apparent good order and condition, except as noted, the following property (contents and condition of packages unknown), marked, consigned and destined as indicated below for shipment at Tacoma to steamship 'Harpagus,'" and so forth. I will ask you whether that bill of lading purports to show that the cargo was aboard the vessel at that time.

A. It does not, that bill of lading—

Q. Did Dodwell & Company at the time the bill of lading was issued take over the warehouse receipts for this cargo? A. We did.

Q. Do you personally know how long the cargo had been on the docks where it was laden by the "Harpagus" prior to that time?

A. Not definitely, but I know it was there for some considerable period.

Q. When did the "Harpagus" arrive on Puget Sound at the Naval Station at Bremerton?

A. About February 15th. I have the actual date in the office.

Q. When did Dodwell & Company, and with whom, perfect arrangements for the shipment of this flour on the "Harpagus," about when?

A. With the Centennial Mill Company on February—it was reserved on February 5th and con-

(Deposition of A. S. Haines.)

firmed by us by letter on February 7th.

Q. At that time when was the "Harpagus" expected to arrive [26] for the purpose of taking this cargo at Tacoma?

Mr. HOLT.—Objected to for the reason it is irrelevant and immaterial.

A. During the last week in February.

Q. Can you fix about the date it was understood she was to arrive here between Dodwell & Company and the Centennial Mill Company with reference to the last day of February?

A. We had continuous correspondence with the Centennial Mill Company, which I read over this morning, showing that we advised them from time to time of the arrival of the boat, the progress of the discharge, and assuring them that (we still expected to load the flour in February) and as the dates progressed we finally informed them it would be the 1st of March when we loaded the flour.

Mr. HOLT.—I move to strike out the testimony of the witness with reference to the understanding and correspondence between Dodwell & Company and the Centennial Mill Company, because it is hearsay, and in no way binding on Diederichsen & Company.

Q. I will ask you to state whether you have an independent recollection, after refreshing your memory from an examination of the correspondence, of the facts which you have testified?

A. If I have a distinct recollection?

Q. Yes, after having refreshed your memory?

(Deposition of A. S. Haines.)

A. Decidedly, yes, sir.

Q. Do you know what occasioned the delay if any in unloading the cargo of coal at Bremerton?

A. We had a couple of holidays and Sundays intervening during the unloading. We attempted to get the Government to work and they refused, and they also refused [27] to work on Saturday afternoons, all of which spread the time out that much further, to the extent of at least two and one-half days.

Q. I referred a moment ago to the duplicate bill of lading for this cargo and called your attention to it. I will ask that this duplicate be marked Defendant's Exhibit No. 1 by the stenographer, and ask you to identify it so that I may offer it as a part of your testimony. Will you kindly identify that, Mr. Haines, as the document concerning which you testified a moment ago?

A. Yes, it is a copy of the original bill of lading.

Thereupon said duplicate bill of lading was offered in evidence and marked Defendant's Ex. No. 1.

Q. Have you in your possession any shipping publications that are standard among shippers of the United States that would indicate the dates of arrival of vessels in the various ports of North and South America, and the dates of departure?

A. Yes, sir, the New York Maritime Register, received weekly, shows the dates of arrivals and departures at all ports.

Q. Is that a publication relied upon by shipping men, the data contained in it, with reference to the

(Deposition of A. S. Haines.)

arrival and departure and mishaps to vessels?

A. Yes, sir, in the same way Lloyd's Shipping List is in England.

Q. You stated, Mr. Haines, that it was customary to issue these bills of lading upon the warehouse receipts for cargo that was in hand for the purpose of shipping upon the vessel. I will ask you if that is—(interrupted) [28]

A. Warehouse or shipping receipts.

Q. Warehouse or shipping receipts. I will ask you if that is the custom that generally prevails up and down the Pacific Coast and throughout the world.

A. I think it is customary with other shipping companies than our own, and so far as we are concerned with the steamers we are handling it is the regular custom.

Q. Mr. Haines, I want to ask you whether in 1912 at any time, or for a long time prior thereto, there were any lines of steamships plying between Pacific Coast ports, including the Puget Sound, and Chefoo, China?

A. No, there never has been a regular line.

Q. On February 5, 1912, at the time the Centennial Mill Company engaged the space for this cargo aboard the "Harpagus" for shipment to Chefoo, were there any other vessels along the Pacific Coast that were available for that shipment?

Mr. HOLT.—I want to object to that as irrelevant and immaterial.

A. I know of none. We were trying in every di-

(Deposition of A. S. Haines.)

rection to get vessels at that time.

Q. Did you at the time your attention was called to this shipment of flour by the Centennial Mill Company make an effort to obtain the earliest possible shipment for this flour?

Mr. HOLT.—I object to that as irrelevant and immaterial.

A. We, of course, had the steamer in hand before we offered the space to the Centennial Mill Company.

Q. Did the Centennial Mill Company advise you at the time they applied for space on the “Harpagus” that they desired the earliest possible shipment?

Mr. HOLT.—I object to that for the same reason, irrelevant, immaterial and leading. [29]

A. Yes, sir, they informed us they wanted it for February shipment.

Q. Did you as general freight agent for Dodwell & Company keep posted with reference to available vessels for shipment to Chefu?

A. We did, we were in constant touch by cable with the charter market in London, as vessels were very scarce at that time and were commanding high rates of freight.

Q. What, in a general way, is the extent and character of the marine business of Dodwell & Company along the Pacific Coast, Seattle, San Francisco, and Puget Sound ports?

A. They are general agents for the Ocean Steamship Company, Ltd., and the China Mutual Steam

(Deposition of A. S. Haines.)

Navigation Company, Ltd., commonly known as the Blue Funnel Line. They also charter from time to time extra vessels, or what we term "tramps," to carry any cargo that may be available for Oriental ports.

Q. Is there any other firm on the Pacific Coast that you know of that transacts a larger Trans-Pacific business than Dodwell & Company?

A. I don't think so.

Q. Did you make an effort to get for the Centennial Mill Company at the time this application was made on February 5th the earliest possible shipment of this flour?

Mr. HOLT.—Objected to as irrelevant and immaterial, the act of a third party in no way binding on Diederichsen & Company?

A. The Centennial Mill Company indicated to us that they had several thousand tons of flour to go to these ports, Chefu, and Taku. On the strength of that communication we laid the steamer "Harpagus" on the berth [30] and then we were in a position to definitely engage this flour from the Centennial Mill Company.

Q. Was there to your knowledge any other vessel between February 5th that was available for a February loading to Chefu and Taku other than the "Harpagus"?

Mr. HOLT.—Objected to as irrelevant and immaterial.

A. I am sure there was not.

Q. If there had been would you have known it as

(Deposition of A. S. Haines.)

general traffic manager for Dodwell & Company?

A. I think we would, for, as I said, we were in close touch with the tonnage situation.

Q. You had your information from Mr. Baumann of the Centennial Mill Company? A. Yes, sir.

Q. Did he advise you that the Centennial Mill Company had chartered the "Indian" in December for this expected shipment of flour?

Mr. HOLT.—This is objected to as hearsay, irrelevant and immaterial.

A. This, however, was common knowledge. I would hesitate to say that Mr. Baumann at that time informed me of it, but I knew it.

Mr. HOLT.—Plaintiff moves to strike the answer as not responsive to the question.

Q. Had you been advised by the marine publication, to which you have referred in your testimony, that the "Indian" had been disabled after leaving Buenos Ayres so that she would be unable to make February sailing?

Mr. HOLT.—Objected to as irrelevant, immaterial and hearsay.

A. I definitely recall that the "Indian" was delayed by a serious accident, I believe to her machinery, but I think it was before she arrived at Buenos [31] Ayres.

Q. But she afterwards arrived in Puget Sound, did she not? A. Yes, sir.

Q. Did your company subsequently charter her after her arrival here?

A. After her arrival here we did.

(Deposition of A. S. Haines.)

Q. In what month was that? A. April, 1912.

Redirect Examination.

(By Mr. HOLT.)

Q. You testified about some correspondence between Dodwell & Company and the Centennial Mill Company? A. Yes, sir.

Q. And Mr. Kerr asked you if you had any independent recollection of that and you said you had. Now, whatever took place between them on that subject consisted of correspondence between Dodwell & Company and the Centennial Mill Company?

A. No, it did not, it was telephone conversations.

Q. As well as correspondence? A. Yes, sir.

Q. But Diederichsen & Company were not parties to it, were they? That is, they were not present and engaged in it in any way? A. No.

Q. No member of that concern? A. No, sir.

Q. It is merely correspondence between Dodwell & Company and the Centennial Mill Company?

A. Yes, sir.

Q. You say that you definitely recollect that the "Indian" was delayed. How did you acquire that knowledge, Mr. Haines? It is not actual knowledge on your [32] part, is it?

A. Not personal knowledge, but we keep posted every day of the movement of vessels.

Q. It is what you get from the newspapers and telegraph dispatches?

A. Telegraph dispatches.

Q. You have no personal knowledge?

A. No, sir.

(Deposition of A. S. Haines.)

Q. Nor of the cause? A. No, sir,

Q. No personal knowledge neither?

A. No, sir.

Q. You were asked, Mr. Haines, about what occurred at Bremerton. You said that the "Harpagus" was unloading her cargo of coal at Bremerton? A. Yes, sir.

Q. That is, the cargo was freight?

A. Yes, sir.

Q. Were you over there at Bremerton while she was there? A. I was.

Q. How many times, Mr. Haines? A. Once.

Q. Was that at or about the time she landed there?

A. Yes, sir.

Q. How long did you stay?

A. Oh, probably two or three hours. I don't recall exactly.

Q. That is, probably on the day she got there or the next day?

A. It was on the day that she arrived.

Q. And you were not there any more during her stay there?

A. No, but we had our Seattle manager there continually,—not continually, but daily.

Q. You personally were not there? [33]

A. No.

Q. You say there were two holidays intervening?

A. I am not sure there were two holidays, but there were two Sundays and a holiday that I recall.

Q. They caused a delay, you say? A. Yes, sir.

Q. What was it you said about the Government?

(Deposition of A. S. Haines.)

A. They declined also to work on Saturday afternoons.

Q. How many Saturday afternoons were there?

A. There was one or two, I could not say which without looking it up.

Q. You think those circumstances, the refusal of the Government to work on Saturday afternoons, Sundays and holidays caused the delay of two days and a half? A. At least two days and a half.

Q. When you first communicated with your house in London with reference to the taking of this cargo, that was some time after February 5th, wasn't it?

A. No, it was before February 5th, because we definitely engaged the flour on February 5th, and we could not make that engagement until after we had the steamer.

Q. Did you agree with the Centennial Mill Company that you would have that boat, the "Harpagus," here in time to load this flour during the month of February? A. No, not definitely.

Q. I will ask you this, Mr. Haines, and ask you to think about it and refresh your memory: Did you really expect or know whether or not the "Harpagus" would be here at this port in the month of February? A. We did.

Q. You expected it to be here?

A. Yes, sir; and we expected to load the flour in February.

Q. You thought you would be able to do so? [34]

A. Yes, sir, we really thought so.

[Deposition of John T. Bibb, for Plaintiff.]

JOHN T. BIBB, called and sworn as aforesaid, testified as follows:

Direct Examination.

(By Mr. HOLT.)

Q. State your name, age, residence and occupation.

A. John T. Bibb; Tacoma, Washington; occupation, flour miller; age, fifty-nine.

Q. Mr. Bibb, this action concerns some eighty thousand sacks of flour that were sent by Connell Brothers Company to Diederichsen & Company, Chefu, China, in the year 1912, on the ship "Harpagus." Do you know anything about that flour?

A. Yes, sir, I made the eighty thousand sacks of Morjon flour for the "Harpagus."

Q. That was a shipment of Connell Brothers Company to Diederichsen & Company?

A. I understand so, yes, sir.

Q. Do you remember when that flour was loaded on the "Harpagus"?

A. Yes, sir, it was begun on the 1st of March.

Q. What year? A. Last year, 1912.

Q. Do you know how long they continued to load that flour?

A. They were at the mill on the 1st and 2d, and went to the Ocean Dock,—the Northern Pacific Dock—docked there the even of the 2d or the morning of the 3d, I have forgotten which, but they were there at the dock on the 3d. [35]

Q. I suppose they remained there some days?

A. I did not follow the ship after the loading of

(Deposition of John T. Bibb.)

the flour. They made a big loading on the 3d and laid there and completed the cargo on the 3d, so far as I was concerned.

Q. That flour was the first cargo loaded on the boat?

A. So far as I know it was, that is my recollection that it was the first.

Cross-examination.

(By Mr. KERR.)

Q. Mr. Bibb, when did you begin the assembling of this flour on the docks of the Tacoma Grain Company and the Northern Pacific Dock No. 1 for shipment? A. I begun on January 6th.

Q. Under your agreement with Connell Brothers originally, by what date were you to have the flour on the dock for shipment?

A. It was to be a February cargo. It was to be ready about,—well, some time in February; early in February we were to prepare the cargo.

Q. Now, when did you say you began to assemble it? A. January 6th.

Q. And up to the 23d of January how much flour did you have on the dock ready for shipment?

A. The 23d of January?

Q. Yes.

A. I had on the dock up to that time 27,000 bags of flour up there then.

Q. What did you have on the 25th?

A. Of what?

Q. 25th of January?

A. Well, I had on there 27,320 bags.

(Deposition of John T. Bibb.)

Q. Now, about that time did you receive any information from the Centennial Mill Company or from Connell [36] Brothers with reference to a specified date when it must be assembled?

Mr. HOLT.—I object to that because it is irrelevant, immaterial and hearsay; conversations between third parties.

A. I had the information that there was a delay, that the load I had started out to prepare for them would probably be delayed.

Q. What vessel were you instructed to—

Mr. HOLT.—I move to strike the answer because it is not responsive to the question.

Q. What vessel were you instructed to prepare a cargo for, in the first place?

Mr. HOLT.—I object to that as irrelevant and immaterial, hearsay; transactions between third parties in no way affecting the plaintiff.

A. The "Indian."

Q. When were you advised that this cargo would go forward on the "Harpagus," what time with reference to February 5th?

A. Some time late in January, I believe it was. I was told—January we prepared that cargo up to the 6th, 7th or 8th—some time early in February, I believe it was, that I was told.

Q. Then within what date in February were you required to have the cargo up on the dock ready to be shipped?

A. Up to the 24th of February the cargo was to be on the dock assembled and ready for the steamer.

(Deposition of John T. Bibb.)

Q. When did you assemble it?

A. On the 21st day of February I had the 80,000 sacks completed and set apart for the "Harpagus."

Q. On these two docks to which I called your attention? A. Yes, sir.

Q. Now, did you receive from the dock companies where [37] the flour was stored warehouse receipts for it? A. Yes, sir.

Q. For all of it? A. Yes, sir.

Q. What did you do with those warehouse receipts ultimately?

A. I turned them over to Dodwell & Company to get bills of lading, as we always do in those cases.

Q. At about what date?

Q. About the 21st or 22d of February.

Q. After you had completed the assembling?

A. Yes, sir.

Redirect Examination.

(By Mr. HOLT.)

Q. Did you say, Mr. Bibb, that when you were informed that the cargo would go forward on the "Harpagus" that the time fixed for your having it assembled ready for shipment was February 24th, but that, as a matter of fact, you had it ready on February 21st?

A. Yes, sir, we had it all there on the 21st.

Q. But the understanding was that you were to have it there ready for shipment by the 24th?

A. Yes, sir, about that. There is a chance for a steamer to come in a little earlier than usual, and I always try to have the cargo ready.

(Deposition of John T. Bibb.)

Q. You were to have it there by not later than the 24th? A. Yes, sir. [38]

Plaintiff's Exhibit "A."

This exhibit is made up of twelve time-cards of the Washington Stevedore Company, Inc., Tacoma. The first of these time-cards states that one hour's service was rendered by three men on Feb. 29th, from 3:30 to 4:30, taking lines Ship "Harpagus"; the next five state time of services of stevedores loading flour on ship "Harpagus" at Tacoma, March 1st to 4th, inclusive; and the last six state time of services of stevedores loading cotton and other cargo on ship "Harpagus" at Tacoma from 6 P. M. March 4th to March 7th, inclusive. [39]

**Defendant's Exhibit No. 1—Export Bill of Lading
No. 6564.**

The Northern Pacific Steamship Company, Tacoma,
Japan and China.

DODWELL & COMPANY, LIMITED.

General Agents.

Received from Centennial Mill Company in apparent good order and condition, except as noted, the following property (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below for shipment at Tacoma to steamship HARPAGUS or any other steamship of the NORTHERN PACIFIC STEAMSHIP COMPANY:

Rates of Freight.

Marks and Numbers.

Articles.

Freight prepaid

MORJON

80000 Qr Sax Flour

1Bdl Empty Sax

80001

One bundle empty sacks
to be delivered to con-
signee if not required
to recondition the flour
at destination.

Weight, lbs. 3,920,000

To be carried by said steamer or any other steamer of the above company to the port of Chefoo (or so near thereto as she or they may safely get), with liberty to call at any port or ports in or out of the customary route (in any order), and to be there delivered to ORDER.

Notify DIEDERICHSEN & COMPANY or to another carrier on the route to destination, if consigned beyond a regular port of call, upon payment of the freight thereon at the rate of charges, advances charges and average, without any allowance of credit or discount. Freight and advance charges payable [40] at carrier's option in advance, in cash, or immediately on discharge of the property at the port of CHEFOO in its equivalent in local currency at bank demand rate of exchange on New York.

In consideration of the rate of freight herein named, it is hereby stipulated that the service to be performed hereunder shall be subject to the conditions, whether printed or written, herein contained, and said conditions are hereby agreed to by the ship-

per and by him accepted for himself and his assigns as just and reasonable.

CONDITIONS.

(Here follow Steamship Company's conditions with respect to the service.)

IN WITNESS WHEREOF, the Agents signing on behalf of the said NORTHERN PACIFIC STEAMSHIP COMPANY, have affirmed to TWO Bills of Lading all of even tenor and date, one of which Bills being accomplished, the others to stand void.

Dated at TACOMA this 28th day of February, 1912.

DODWELL & COMPANY, LTD.,

A. S. H., General Agents,

General Freight Agent. [41]

Upon motion of the plaintiffs the Court struck from the deposition of A. S. Haines and refused to receive in evidence the following testimony, to wit: "We had continuous correspondence with the Centennial Mill Company, which I read over this morning, showing that we advised them from time to time of the arrival of the boat, the progress of the discharge, and assuring them that we still expected to load the flour in February; and as the dates progressed we finally informed them it would be the 1st of March when we loaded the flour"; with the exception of the words "we still expected to load the flour in February"; said testimony having been given during the cross-examination of said witness.

First Exception.

To which said ruling of the Court the defendant then and there excepted.

Thereupon each and all of said depositions and exhibits, with the exception of the aforesaid portion of the deposition of A. S. Haines, were admitted and read in evidence.

It was then stipulated and admitted by the plaintiffs and the defendant that the copy of the document annexed to the answer of the defendant in this case and marked Exhibit "A," is a true copy of the contract between the plaintiffs and the defendant.

The foregoing constitutes all the evidence introduced on behalf of the plaintiffs, and the plaintiffs thereupon rested. [42]

And be it further remembered that the defendant thereupon offered in evidence the depositions of H. F. Ostrander, M. J. Connell, and L. P. Baumann. Said depositions having been taken at Seattle, Washington, U. S. A., before the Clerk of the Superior Court of King County, Washington, under stipulation of the plaintiffs and the defendant, and the plaintiffs being represented at the taking of said depositions by R. S. Holt, Esq., and the defendant being represented by J. A. Kerr, Esq. Said depositions and the exhibits attached thereto being as follows, to wit:

[Deposition of H. F. Ostrander, for Defendant.]

H. F. OSTRANDER, a witness on behalf of the defendant, being first duly sworn, testified as follows:

Q. State your name, age, occupation and place of residence.

(Deposition of H. F. Ostrander.)

A. H. F. Ostrander; 37; shipping; residence, Seattle.

Q. In what business are you now, and in what business have you been engaged for a number of years?

A. In the shipping and brokerage business.

Q. What is the title of your firm?

A. My name personally.

Q. Are you acquainted with Connell Brothers Company, of this city, the defendant in this cause?

A. Yes, sir.

Q. Are you acquainted with the Centennial Mill Company? A. Yes, sir.

Q. Did you at any time during the latter part of the year 1911 undertake to charter a steamship for the transportation of a cargo of flour—of 80,000 bags of “Marjon” flour from Seattle to Chefoo, China?

A. I chartered the steamer “Indien” on behalf of the Centennial Mill Company for a full cargo of flour. [43] Chefoo was one of the ports of discharge.

Q. At what date and with whom did you open your negotiations for the charter of the “Indien”? Do you remember the date without looking at your telegrams?

A. No, I do not. I was going to make answer that the business was carried on by cable and the records would show. (Telegram shown witness.) The charter of the “Indien” was in the early part of December.

Q. With whom did you open negotiations for the

(Deposition of H. F. Ostrander.)

charter of the "Indien"?

A. With the owner in Copenhagen.

Q. Did you have any communication with Parrott & Company of San Francisco?

A. Only in regard to the whereabouts of the steamer.

Q. I requested you, Mr. Ostrander, several days ago, to endeavor to get the originals of your cablegrams to the owner of the "Indien," so they might be offered in evidence in connection with your testimony. Were you able to get them?

A. I was advised by both the Western Union and the Postal Telegraph Company that their originals to March 1st, 1912, had been destroyed. They keep them for one year only.

Q. I call your attention to what purports to be a copy of a telegram dated December 7th, 1911, from yourself to Parrott & Company at San Francisco, as follows: "Please wire when 'Indien' due yours and time you estimate discharge will take," and I will mark this for identification "Defendant's Exhibit 3," and ask you if that is a true copy of the telegram you sent Parrott & Company, if you did send it?

A. Yes, sir. [44]

Q. I call your attention to what purports to be a telegram from Parrott & Company of San Francisco, dated December 7th, 1911, directed to you, which I will mark "Defendant's Exhibit 4," as follows: "H. F. Ostrander, Seattle, Wash. 'Indien' due about January twenty-fifth discharge estimated about twelve days. Signed Parrott & Co.," and will ask

(Deposition of H. F. Ostrander.)

you whether you received that in reply to Defendant's Exhibit No. 3.

Mr. HOLT.—Plaintiff desires to object to this as irrelevant, incompetent and immaterial, and for the reason there is no proof of the genuineness of the dispatch.

A. That is a copy of the telegram I received.

Q. I call your attention to a letter from Parrott & Company to you under the same date, which I will mark "Defendant's Exhibit 5," as follows: "Acknowledging receipt of your wire of even date, we beg to enclose copy of telegram just sent to you, which is self-explanatory." Does that refer to the telegram which you have just identified?

Plaintiff objects as incompetent and immaterial.

A. Yes, sir.

Q. Do you remember the date when you opened up your negotiations with the owner of the "Indien" at Copenhagen?

A. I do not recall the exact date. There were some cable communications in the early part of December; the steamer was fixed the latter part of the month.

Q. I call your attention now to what purports to be a cablegram from yourself to the East Asiatic Company, Limited, Copenhagen—both to the code telegram sent and the confirmation translation of it, which I will mark for identification "Defendant's Exhibit 6," [45] the cablegram bearing date December 26, 1911, and ask if you sent that cablegram? A. Yes, sir.

(Deposition of H. F. Ostrander.)

Q. Did you send the confirmation attached to the original code cablegram—attached to that exhibit?

A. I mailed them the confirmation.

Q. Who were the owners of the “Indien”?

A. The East Asiatic Company.

Q. You received a reply to that cablegram?

A. Yes, sir.

Plaintiff objects, as incompetent, irrelevant and immaterial; the transaction between said parties not in any way affecting plaintiff.

Q. I call your attention to what purports to be a code telegram, which I shall mark for identification “Defendant’s Exhibit 7,” bearing date December 27th, 1911, from the owner of the “Indien” at Copenhagen to yourself, attached to which is the translation thereof, and will ask if you received this cablegram in reply to Exhibit 6?

Plaintiff objects as irrelevant, incompetent and immaterial; as the acts or declarations of third persons and in no way binding on the plaintiff.

A. Yes, sir.

Q. Did you reply to that cablegram of December 27th from Copenhagen? A. I did.

Q. I call your attention to what purports to be a code cablegram and the translation thereof under date of December 27th, from Copenhagen?

A. I did.

Q. I call your attention to what purports to be a code cable, which I shall mark for identification “Defendant’s Exhibit 8,” and the translation there sent by you under date of December 27th, and ad-

(Deposition of H. F. Ostrander.)

dressed to the East Asiatic Company, and will ask whether you sent that cablegram and mailed [46] the translation attached in confirmation of it to the owner?

Plaintiff objects to this as irrelevant, incompetent and immaterial and as the acts or declarations of third persons, in no way binding on plaintiff.

A. I sent the message.

Q. Did you receive a reply to that cablegram about which I last inquired? A. I did.

Q. I call your attention to defendant's identified Exhibit 9 purporting to be a code cablegram from the East Asiatic Company, Limited, to yourself, under date of December 28th and will ask whether you received that cablegram and confirmation from the owner of the "Indien."

Plaintiff objects to this as irrelevant, incompetent and immaterial and as the act or declaration of third parties and not binding upon plaintiff.

A. I received the message.

Q. Did you reply to that message?

A. Yes, sir.

Q. I call your attention to what purports to be a code cablegram and letter of translation, which I have marked for identification "Defendant's Exhibit ——" and ask you to examine it and state whether or not it is a correct copy of your answer to that cablegram.

Plaintiff objects to this as irrelevant and immaterial and because it is a mere act or declaration of third persons and in no way binding upon plaintiff.

(Deposition of H. F. Ostrander.)

A. I sent that message.

Q. Did you receive a reply to that message under date of December 29th, 1911? [47] A. Yes, sir.

Q. I call your attention to defendant's identified Exhibit 10, purporting to be a code cablegram from the East Asiatic Company, Limited, to yourself, with translation and letter of confirmation and ask whether you received that from the owner of the "Indien."

Plaintiff objects to this as being irrelevant, incompetent and immaterial, and because it is a mere act or declaration of third parties and not in any way binding upon plaintiff.

A. I received the message.

Q. I call your attention to defendant's identified Exhibit 11, being a code cablegram from the East Asiatic Company, Limited, to yourself bearing date December 29th and letter of translation connected therewith: "Charter is confirmed. Copies by first mail. Shippers. Centennial Mills Company chartering in my name" and will ask if you sent that cablegram.

Plaintiff objects to this as irrelevant, incompetent and immaterial, and as being a mere act or declaration of third parties and not binding upon plaintiff.

A. I did.

Q. I call your attention to an original letter from the East Asiatic Company, Limited, identified as "Defendant's Exhibit 12," attached to which are copies of telegrams to which I have called your attention, all bearing date December 30, 1911, and will ask

(Deposition of H. F. Ostrander.)

you to state whether you received from the East Asiatic Company, Limited, this letter with the confirmation of [48] telegrams attached thereto.

Objected to by plaintiff as irrelevant, incompetent and immaterial and as being a mere act or declaration of third persons in no way binding upon plaintiff.

A. I did.

Q. Did you know the position of the steamship "Indien" at the time you opened negotiations for the charter-party on December 26th?

Objected to by plaintiff as irrelevant and immaterial.

A. Only as represented to me by the owner through Mr. Jelstrup, referred to in one of those messages, who had been on the Coast some time prior and informed me that she would be available for early February loading here on Puget Sound.

Mr. HOLT.—I move to strike out the statement of Mr. Ostrander as to what Mr. Jelstrup told him, for the reason that it is not responsive to the question.

Q. Were you informed at any time by an representative of the East Asiatic Company, the owner of the "Indien" as to what her position was at the time the charter-party was negotiated—at the time your negotiations commenced?

A. Mr. Jelstrup, special representative of the company, was on the Coast and stated that he would have the steamer here available for loading early in February.

Q. Who is Mr. Jelstrup?

A. A man connected with the East Asiatic Com-

(Deposition of H. F. Ostrander.)

pany in Copenhagen and who was making a study of conditions on the Coast in their behalf.

Q. Do you know what relation, if any, Parrott & Company of San Francisco sustained to this ship or her owner?

A. They were the agents in San Francisco and Tacoma. [49]

Q. I call your attention to defendant's identified Exhibit 13, purporting to be a copy of a letter from you to Parrott & Company, under date of January 15th, 1912, in which you state: "Some time since you advised me that the steamship 'Indien' was due at yours about January 25th. I *not* in the Guide that she is last reported as having arrived at Buenos Ayres December 15th. I should greatly appreciate your giving me by letter the last advices as to her position and when you make her due at yours as you will doubtless be advised in due course." I will ask you if you wrote that letter to Parrott & Company, the agents at San Francisco of the owner of this vessel.

Plaintiff objects for the reason that it is incompetent, irrelevant and immaterial and a mere declaration of third persons in no way binding on plaintiff.

A. I sent that letter.

Q. I call your attention to two letters from Parrott & Company of San Francisco to yourself, dated January 18th and January 23d respectively, and identified as Defendant's Exhibit 14, in which the letter to which I last called your attention (Exhibit 13) is referred to and will ask you if you received those

(Deposition of H. F. Ostrander.)

letters from Parrott & Company.

Plaintiff objects as irrelevant and immaterial and the act or declaration of third persons in no way binding on plaintiff.

A. I received the letters.

Q. In the letter of January 23d, of Exhibit 14, Parrott & Company state: "We have just received a cable from the East Asiatic Company, Limited, Copenhagen, advising that the steamship 'Indien' has been detained for [50] repairs at Buenos Ayres and that she will not leave there before next Saturday. The East Asiatic Company gives us early in March as the time of her approximate arrival here." Was that the first notice you received that the steamship "Indien" would not arrive on Puget Sound in time for February loading?

Plaintiff objects to that as irrelevant and immaterial, and because it is a leading question.

A. I think that was the first information I had.

Q. Did the steamship "Indien" come to Puget Sound under the charter that you have referred to?

A. She did.

Q. What time did she arrive in Puget Sound?

A. I shall have to refer to my correspondence to give you the date.

Q. I call your attention to what purports to be a letter from the master of the "Indien," dated Tacoma, April 11th, 1912, addressed to you, the letter-head marked "S. S. Indien" and will ask if you received that letter at about that date. (Defendant's Exhibit 15.)

(Deposition of H. F. Ostrander.)

Plaintiff objects to that as irrelevant and immaterial and as an act or declaration of a third person in no way binding upon the plaintiff.

A. I did.

Q. Do you know that the steamship "Indien" arrived and was in port at that date—April 11th, 1912?

A. I received that letter on board the steamer at Tacoma.

Q. What relation, if any, did the firm of W. R. Grace & Company of Seattle sustain to this steamer "Indien," or the East Asiatic Company?

A. None, that I know of.

Q. After you learned that the vessel could not arrive did [51] you make any effort to ascertain what the trouble was with her?

Plaintiff objects as irrelevant and immaterial, and as an act or declaration of a third person in no way binding on plaintiff.

A. I made inquiry through the Seattle office of W. R. Grace & Company and requested them to ascertain from their agents in Buenos Ayres the reason for the delay of the "Indien" at that port.

Q. Assuming, Mr. Ostrander, that the steamer "Indien" had arrived at Buenos Ayres on the 15th of December and that she sailed from there as indicated in these cablegrams about the 25th of December, what would you say as to whether she could be reasonably expected to have arrived in Puget Sound for an early February loading?

Plaintiff objects because it is not shown that Mr. Ostrander is competent to pass an opinion on the sub-

(Deposition of H. F. Ostrander.)

ject and because it is not a proper subject for an opinion, and that his opinion thereon is irrelevant and immaterial.

A. She should have made a middle of February loading.

Q. Just briefly state to the Court, Mr. Ostrander, some of your experience in the handling of vessels,—in the navigation and operation of vessels.

A. I have had several years' experience in the general chartering business.

Q. Did you or did you not advise the Centennial Mill Company and Mr. Connell on receipt of the information that this vessel had been disabled.

Plaintiff objects to the question as leading in form and because it injects into it the assumption that the vessel has been disabled. [52]

A. I notified the Centennial Mill Company.

Q. Do you remember at about what date?

A. Immediately that I learned there would probably be a delay to the steamer.

Mr. KERR.—The defendant now offers its identified exhibits, numbered 3 to 15, inclusive, in evidence:

Mr. HOLT.—It is hereby stipulated that one general objection may, so far as it is applicable be made to each of these exhibits, special objections being urged separately.

Plaintiff objects generally to each and every one of the exhibits offered in evidence numbered from 3 to 15, inclusive, on the ground that they are irrelevant and immaterial; that they are mere acts or declara-

(Deposition of H. F. Ostrander.)

tions of third persons, in no way binding upon the plaintiff.

Plaintiff objects specially to that letter which was attached to Exhibit 14, dated January 23d, 1912, signed by Parrott & Company, beginning, "We beg to acknowledge receipt, etc.," for the reason that the statements of Parrott & Company on the subject contained in the letter are incompetent, irrelevant and immaterial and that the letter is incompetent and immaterial for the reason that it is the mere act or declaration of a third person and in no way binding upon the plaintiff.

Mr. KERR.—Q. You prepared the formal charter-party for this vessel, did you not, Mr. Ostrander?

A. Yes, sir. [53]

Q. And forwarded it to the owner?

A. Yes, sir.

Q. In a letter from the owner under date of January 16, 1912, bearing the stamp "Received Seattle Feb. 3, 1912," the owner states: "We will send you the charter-party to-morrow." Did you ever receive the formal charter-party from them?

A. I did not.

Q. But the vessel came here under the charter-party? A. Yes, sir.

[Deposition of M. J. Connell, for Defendant.]

M. J. CONNELL, a witness on behalf of the defendant, being first duly sworn, testified as follows:

Q. State your name, age, place of residence and occupation.

(Deposition of M. J. Connell.)

A. M. J. Connell; 46; Seattle, Washington; merchandise, broker.

Q. What relation do you sustain to the defendant, Connell Brothers Company?

A. I am the president of the company.

Q. Does your company maintain a place of business at Shanghai, China? A. Yes, sir.

Q. Who is in charge of your office in Shanghai?

A. J. J. Connell.

Q. Who is the president of your company?

A. M. J. Connell.

Q. Who is the vice-president?

A. J. J. Connell.

Q. You have charge of the business of Connell Brothers Company at Seattle? [54]

A. Yes, sir.

Q. And your brother in the Orient?

A. Yes, sir.

Q. Are you acquainted with the plaintiff, Diederichsen & Company? A. Only by name.

Q. Did your firm sell to the plaintiff for February delivery some flour?

A. We sold for shipment, not delivery.

Q. Sold for shipment? A. Yes, sir.

Q. How much? A. 80,000 quarter sacks.

Q. What brand? A. "Morjon" brand.

Q. At what date and in what manner did your firm receive the order here?

A. By cable, early in October.

Q. October 13th? A. About that date.

Q. In what business is the firm of Connell Broth-

(Deposition of M. J. Connell.)

ers Company engaged? Give the Court an idea.

A. In the selling of flour and attending to the details in connection with the sales.

Q. Are you exporting flour, among other things, to the Orient? A. Yes, sir.

Q. Were you at that time A. Yes, sir.

Q. You are not manufacturers of flour?

A. No, sir. [55]

Q. Who manufactures the "Morjon" brand of flour? A. The Centennial Mill Company.

Q. Who owns that brand?

A. Connell Brothers Company and the Centennial Mill Company.

Q. Is it a copyrighted brand? A. Yes, sir.

Q. Now, on receipt of this order from Diederichsen & Company for this flour, what did you do?

A. Placed it with the Centennial Mill Company.

Q. The manufacturers of this brand?

A. Yes, sir.

Q. How was the flour to be paid for?

A. By Banker's Letter of Credit at Seattle.

Q. Was the credit established with Seattle originally?

A. No, with the Wells-Fargo-Nevada National Bank at San Francisco.

Q. Do you remember about the date when this credit was arranged with the Wells-Fargo-Nevada National Bank?

A. About the 15th or 17th of December—we had advices that credit would be immediately cabled and

(Deposition of M. J. Connell.)

it was cabled through a wire, I think, from those people originally.

Q. Did you receive a notice from the Wells-Fargo-Nevada National Bank with reference to the credit arranged under which the flour was to be paid for?

A. Yes, sir.

Q. I call your attention to a letter which I have marked for identification "Defendant's Exhibit 16," purporting to be a letter under date of December 27th, 1911. I will ask you whether you received this letter.

Plaintiff objects to this because this letter is [56] irrelevant and immaterial; is a mere act or declaration by third persons and in no way binding upon plaintiff.

A. Yes, sir.

Q. Did that letter come to you through the United States mails? A. Yes, sir.

Q. This letter recites that the Seattle National Bank at Seattle, Washington, had been given the authority referred to in the letter. Did you receive any notice from the Seattle National Bank with reference to this authority in the premises?

A. Yes, sir.

Q. I call your attention to defendant's identified Exhibit 17 and will ask if you received this letter from the Seattle National Bank with reference to this credit.

Plaintiff objects to this letter as irrelevant and immaterial as the mere act or declaration of third persons and in no way binding upon plaintiff.

A. I did.

(Deposition of M. J. Connell.)

Q. Did Diederichsen & Company pay you for this flour in accordance with the credit established with the Wells-Fargo-Nevada National Bank?

Plaintiff objects to this question because the testimony is irrelevant and immaterial and at best is a mere assumption of the witness, as a conclusion and not a statement of any fact.

A. Yes, sir.

Q. At what date, Mr. Connell, did Diederichsen & Company pay you for this flour through the Seattle National Bank?

Plaintiff objects to this question for the reason [57] that it does not appear anywhere that they paid him through the Seattle National Bank.

Q. On what date did they pay you for the flour?

A. On February 28th.

Q. On February 28th, 1912? A. Yes, sir.

Q. Did you deliver to the Seattle National Bank any documents at that time?

Objected to by plaintiff as irrelevant and incompetent, the act of the party invoked on his own behalf and in no way binding upon the plaintiff.

A. Bills of lading and insurance policies.

Q. Bills of lading and insurance policies for this shipment of flour? A. Yes, sir.

Q. How much did they pay you? Do you remember? A. I could not state the exact figure.

Q. They paid you in full for the flour in accordance with the contract? A. Yes—about \$83,000.

Q. From whom did you receive the bills of lading?

A. From the Centennial Mill Company.

(Deposition of M. J. Connell.)

Q. When did you first learn that a claim was made that this flour was not actually on board the vessel at the time the bills of lading for the cargo were delivered to you? A. About January, 1913.

Q. Practically one year afterwards?

A. Yes, sir.

Q. At the time this order was placed with the Centennial Mill Company had you any information as to the chartering of the "Indien"? A. Yes, sir.

[58]

Q. What was that information, Mr. Connell?

Plaintiff objects to this question on the ground that it is irrelevant, incompetent and immaterial; that it is a mere statement of the party himself, one of the parties to the action, as to some fact which he knew.

A. The steamship "Indien" was chartered as a special steamer to make Chefoo, which is not a regular port of call.

Mr. HOLT.—I move to strike out that part of the answer in reference to Chefoo not being a regular port of call, because not responsive to the question.

Q. How long have you been engaged in the export business in Shanghai, Mr. Connell?

A. Some 12 or 14 years.

Q. Have you been carrying on a business in the Orient during all that time? A. Yes, sir.

Q. How long has the defendant had a place of business in the Orient? A. 12 or 14 years.

Q. Has your export business between the ports of Puget Sound and the ports of Japan and China been

(Deposition of M. J. Connell.)

extensive or otherwise?

A. It has been extensive.

Q. I will ask you whether there were in 1911 and 1912 any lines of steamships operating regularly between Puget Sound ports and Chefoo. A. No.

Q. Was there any means of reaching Chefoo except by special charge? A. Not directly. [59]

Q. At the time you placed this order for this flour with the Centennial Mill Company did you place it in writing? A. Yes, sir.

Q. I call your attention to defendant's identified Exhibit 18, which is your letter to the Centennial Mill Company of October 14th, and your order to the Centennial Mill Company for this flour of the same date, and ask you if that is the order and the letter accompanying it. Yes, sir.

Q. I now call your attention to defendant's identified Exhibit 19, being the letter of acknowledgment of the Centennial Mill Company under date of October 16th of your letter of the 14th. Did you receive this letter? A. Yes, sir.

Q. I now call your attention to defendant's identified Exhibit 20, being the acknowledgment of the Centennial Mill Company of the order for this flour in controversy and will ask you if you received that acknowledgment from the Centennial Mill Company.

Plaintiff objects to this as irrelevant and immaterial and as the mere act or declaration of third persons and in no way binding upon the plaintiff.

A. Yes, sir.

Q. I now call your attention to defendant's identi-

(Deposition of M. J. Connell.)

fied Exhibit 21, being the salesman's copy of the invoice of the flour in controversy shipped on the "Harpagus" and ask you if you received that from the Centennial Mill Company.

Plaintiff objects to this as irrelevant and immaterial, because it is an act or declaration of [60] third persons in no way binding on the plaintiff, and is hearsay.

A. Yes, sir.

Mr. KERR.—The defendant now offers in evidence the letter of the Wells-Fargo-Nevada National Bank, identified as defendant's Exhibit 16.

Plaintiff objects to this letter because it is irrelevant and immaterial, being the mere act or declaration of third persons and in no way binding upon the plaintiff.

Mr. KERR.—The defendant now offers in evidence defendant's identified Exhibit 17, being the letter of the Seattle National Bank of December 30th, 1911.

Plaintiff objects to this letter because it is irrelevant and immaterial, being the mere act or declaration of third persons and in no way binding upon the plaintiff.

Mr. KERR.—The defendant now offers in evidence by agreement—the original being waived—copy of the letter of the Centennial Mill Company to Connell Brothers Company of October 16th, 1912, identified as Defendant's Exhibit 18.

Plaintiff objects to this letter because it is irrelevant and immaterial, being the mere act or declara-

(Deposition of M. J. Connell.)

tion of third parties in no way binding upon plaintiff.

The defendant now offers in evidence defendant's identified Exhibit 18, being a copy of the letter containing the original order, and the order for the flour in controversy. [61]

Plaintiff objects to this letter because it is irrelevant and immaterial, being the mere act or declaration of third persons and not binding upon the plaintiff.

The defendant now offers in evidence its identified Exhibit 20, being the acknowledgment of the order of Connell Brothers Company to the Centennial Mill Company.

Plaintiff objects to this letter because it is irrelevant and immaterial, being the mere act or declaration of third persons and in no way binding upon plaintiff.

The defendant now offers in evidence a copy of the invoice of flour shipped, under date of February 28th, being Defendant's Exhibit 21.

Plaintiff objects to this as irrelevant and immaterial, being the mere act or declaration of third persons in no way binding upon the plaintiff.

Q. (Mr. CONNELL.) I note that the letter of the Wells-Fargo-Nevada National Bank of December 29th, 1911, to you, recites that that Bank had "been requested by the Russo-Asiatic Bank at Shanghai to negotiate as offered your bills drawn in duplicate on Messrs. Diederichsen & Company, Chefoo to the extent of \$83,000. The shipment is described as

(Deposition of M. J. Connell.)

80,000 bag of flour to Chefoo, shipment February, March, 1912. Bills to be drawn at three days' sight, accompanied with the following documents: Invoices; Policy of Marine Insurance; and Full Sets of Bills of Lading, which are to be made out to order and blank endorsed. This authority to remain in force till May 1st, 1912." Now, at the time you were paid for this flour by the Seattle National Bank did you deliver over to that [62] Bank, in accordance with the letter of instructions of Wells-Fargo-Nevada National Bank invoices, policy of marine insurance and full sets of bills of lading?

Plaintiff objects to this question because it is a double question and because it is leading, irrelevant and immaterial; is an act of Mr. Connell himself, invoked in his own behalf. The chief objection to the question is that it contains a double question,—whether he made the deliveries, and whether he made them in accordance with the contract.

A. Yes, sir.

Q. When did you first learn, Mr. Connell, that the "Indien" which was chartered in December to carry this flour, had become disabled and could not arrive for a February loading?

Plaintiff objects to this question as being irrelevant and immaterial when Mr. Connell learned of this fact or whether he did learn of it. The question is further objected to because leading, and further objected to because it contains a number of questions in one—the question being not only when he learned the ship could not arrive, but when it was

(Deposition of M. J. Connell.)

disabled, without it appearing as a fact that she was disabled and without it appearing as a fact that he knew of it in a manner that would enable him to testify to it.

A. Some time in January, 1912.

Q. When did you learn, if you did learn at all that the owner claimed the vessel was disabled so she could not arrive for February loading?

Objected to as irrelevant and immaterial.

A. Some time in January, 1912. [63]

Q. From whom did you get your information?

A. From the Centennial Mill Company.

Q. Do you know personally what steps were taken, if any, to secure a vessel for February loading?

A. Yes, there was an effort made to immediately secure some other steamer for February shipment.

Q. When were you first advised and by whom, if you were so advised, that the steamship "Harpagus" had been fixed to carry this flour?

Plaintiff objects to that on the ground that it is irrelevant and immaterial and because it appears from the form of the question that it is a matter about which the witness has no actual personal knowledge,—except from hearsay.

A. About February 1st.

Q. How soon were you advised that the "Harpagus" had been secured after you received information that the "Indien" would not make her loading date?

Plaintiff objects to that as irrelevant and immaterial and because it is a double question, two or three

(Deposition of M. J. Connell.)

questions in one, and invokes an assumption of fact of which the witness claims to have no knowledge.

A. About a week or ten days.

Q. From whom did you receive such advice?

A. From the Centennial Mill Company.

Q. From what individual connected with the Centennial Mill Company?

A. From L. P. Baumann, manager.

Q. Were you advised by Mr. Baumann at what date the "Harpagus" would arrive on Puget Sound for the purpose of taking this cargo?

Objected to as irrelevant and incompetent and the [64] mere act or declaration of third persons in no way binding upon the plaintiff.

A. About February 16th.

Q. Were you advised of the date when the "Harpagus" arrived at Bremerton on Puget Sound?

Plaintiffs object as irrelevant and immaterial, as it appears that it was mere information given to the witness by someone else, and hearsay.

A. I would not say that I was advised definitely of her arrival.

Cross-examination by Mr. HOLT.

Q. You say you learned that she was disabled. You have no knowledge of your own as to whether the "Indien" was disabled or not, have you?

A. No, sir.

Q. You say that you learned that the owner claimed that she was disabled through the Centennial Mill Company. You had no actual knowledge on that subject yourself? A. No, sir.

(Deposition of M. J. Connell.)

Q. Have you any actual knowledge as to when the "Harpagus" was expected to arrive here, except the information upon that subject given you by Mr. Bauman of the Centennial Mill Company?

A. No, sir.

Q. You say, Mr. Connell, that in January or February, 1912, there were no regular lines of steamers operating at that time between ports on Puget Sound and Chefoo? A. Yes, sir.

Q. Now, at the time you made this contract for the shipment of this flour were there any regular boats operating between Puget Sound ports and Chefoo?

A. No, sir. [65]

Q. The conditions had not changed in that respect when you sold and agreed to ship the flour and the time when it was to have been shipped under the contract? A. No, sir.

Q. Now, Mr. Connell, you say that Diederichsen & Company paid you through the bank?

A. Yes, sir.

Q. I will ask you if it was not a fact that the payment occurred in this way: That you arranged through Wells-Fargo-Nevada National Bank to have your drafts accepted for this flour—drafts on Diederichsen & Company accepted, and they arranged through the Russo-Asiatic Bank at Shanghai.

A. We made no arrangement at all. They made the arrangement themselves for paying for the flour here.

Q. Yes, they arranged through the Wells-Fargo-Nevada National Bank that the Wells-Fargo-Nevada

(Deposition of M. J. Connell.)

National Bank would accept your drafts on them for the amount?

A. I do not understand it that way.

Q. This money was paid to you—was placed to your credit, I suppose, at the Seattle National Bank, was it not? A. Yes, sir.

Q. By the Wells-Fargo-Nevada National Bank, you negotiating three days' sight drafts on Diederichsen & Company through the Seattle National Bank for the money—that is the way it was done?

A. Yes, sir.

Q. And you drew these drafts and turned them in to the Seattle National Bank and got your credit?

A. Yes, sir.

Q. Now, the understanding was—was that money to be paid before the flour was shipped?

A. On the presentation of these documents the money was to [66] be paid.

Q. Of what documents?

A. Those set forth in the letter of credit.

Q. To be paid before the flour was loaded?

A. I don't know.

Q. Did you know whether the flour was loaded when you presented those drafts? A. I did not.

Q. Do *you* as a matter of fact it had been shipped when you presented the drafts to the bank?

A. I knew nothing about that.

Q. The money had been arranged for—it had been arranged with the Seattle National Bank on December 30,—at least they had notified you that they stood ready to accept your drafts and you drew them

(Deposition of M. J. Connell.)

on the day when they were drawn?

(The date does not show here.)

A. Yes, sir.

Q. At the time you negotiated these drafts and delivered these bills of lading, invoices and policy of marine insurance, did you know whether or not the flour had been shipped? A. No, I did not.

Q. You did not know that? A. No.

Q. And you do not claim that it had been at that time?

A. Nothing more than I presumed it was.

Redirect Examination by Mr. KERR.

Q. Did you or did you not presume that the flour had been shipped when the bills of lading were delivered to you?

Objected to as irrelevant and incompetent. [67]

A. I presumed it was.

Q. Now, Mr. Connell, did you have any control whatever over the movements of the "Indien" after she was chartered? A. No, sir.

Q. Assuming that the order placed with your Shanghai house by Diederichsen & Company contained this clause: "All agreements herein contained or implied are contingent upon strikes, accidents and other delays unavoidable or beyond our control"—I will ask you to state whether it was within your power to have avoided the delay of the arrival of the "Indien" on Puget Sound for the purpose of taking this flour.

Objected to by plaintiff as irrelevant and immaterial. A. No, sir.

Q. Do you know, Mr. Connell, why you put that

(Deposition of M. J. Connell.)

clause in all orders for merchandise of this character to be shipped to the Orient?

Objected to by plaintiff because the purpose of Mr. Connell in putting it in is irrelevant and immaterial, unless it was a matter of understanding or agreement between himself and the plaintiff on that subject so as to make it a part of the contract.

A. Because we do not control the steamships—have no control over them and can only ship as the ships sail.

Q. To what extent, if any, is that clause inserted in all orders for merchandise shipped to ports to which no regular lines of steamers operate?

Objected to as irrelevant and incompetent.

A. On all orders and to every port. [68]

Q. Could an exporter from Puget Sound ports handle his product—such as flour—upon orders for shipment to ports in the Orient to which no regular line of steamships run, and conduct an export business unless they inserted in the agreement such contingencies as strikes, accidents and other delays unavoidable or beyond their control?

Objected to as irrelevant and immaterial.

A. No, sir.

Q. You say you were paid for this flour on February 28th, 1912. On what day did you pay the Centennial Mill Company for the flour?

A. On the same day.

Q. What amount did you pay them?

A. The same amount.

Q. Are you in touch with vessels, and were you in

(Deposition of M. J. Connell.)

January and February, 1912—operating between Puget Sound ports and ports in the Orient?

A. Yes, sir.

Q. I ask you whether between the time you received information that the “Indien” would not arrive on time there was any other vessel known to you by which or upon which this cargo could have been forwarded to Chefoo, other than the “Harpagus.”

Plaintiff objects to this question because leading, irrelevant and immaterial and as injecting into it the question of information as to the “Indien” being disabled which has not been established, and which the witness has shown he knows nothing about.

A. No, sir.

Mr. KERR.—From the nature of the objections made by counsel he seems to think that the letters, cablegrams and documents defendant has offered in evidence [69] are offered for the purpose of binding the plaintiff in some manner in a contract, whereas the purpose of the defendant in offering these letters, cablegrams and documents is to show the good faith with which the defendant in this case acted from the time of the receipt of this order.

Mr. HOLT.—The plaintiff states that if counsel would confine himself simply to the effort to prove those matters and not inject other matters into the record, probably there would not be any objections.

Recross-examination.

Q. Mr. Connell, there is one question I would like to ask you. You say there were no other ships sailing at this time for Chefoo between the time you

(Deposition of M. J. Connell.)

contracted to ship this flour and the time you shipped it, except the "Harpagus"?

A. I would not say there were no other ships—there was no regular ship.

Q. Was there at any time any regular line of ships sailing from Puget Sound ports to Chefoo?

A. No, sir.

Q. The "Indien" was not a ship sailing regularly from Puget Sound ports to Chefoo? A. No.

Q. Neither was the "Harpagus"? A. No, sir.

Q. There were other ships, however, sailing from Puget Sound and touching at other ports in China?

A. Yes, sir.

Q. And if the flour had been shipped by one of them it would have been necessary to trans-ship it at some port in China? A. Yes, sir. [70]

Mr. KERR.—In that event it would probably have arrived several weeks later than it did. would it not? A. Yes, sir.

[Deposition of L. P. Baumann, for Defendant.]

L. P. BAUMANN, a witness on behalf of the defendant, being first duly sworn, testified as follows:

Q. State your name, age, place of residence and occupation.

A. L. P. Baumann; 47; residence, Seattle, Washington; occupation, export and assistant general manager of the Centennial Mill Company, operating mills at Seattle, Tacoma, and other points in the State of Washington.

Q. How long have you been Export Manager for the Centennial Mill Company?

(Deposition of L. P. Baumann.)

A. For over six years.

A. I wish you would state briefly about the extent of the export flour business, particularly to the Orient, as carried on by the Centennial Mill Company for the past ten or twelve years.

A. The volume?

Q. Yes, the volume.

A. We generally ship from five to ten million bags of flour to the Orient per annum.

Q. What are your particular duties as Export Manager with reference to the shipment of flour to the Orient?

A. I have full charge of the export business, receive and send cablegrams, accept orders, look after the exporting of same, and procure tonnage or space on vessels. [71]

Q. Mr. Baumann, I call your attention to defendant's identified Exhibit 20, which is a copy of the original acceptance of an order from Connell Brothers Company for the flour in controversy. I will ask you if your name was subscribed to the original acceptance. A. It was.

Q. Under what date did you receive and accept the order?

A. The order was received on October 14th and was acknowledged in writing on October 16th, 1911.

Q. By what company is the brand of flour known as "Morjon" manufactured? A. By us.

Q. What, Mr. Baumann, did you do, or what did your company do with reference to the arrangement for the transportation of this flour from Puget Sound

(Deposition of L. P. Baumann.)

to Chefoo, and when did you make any arrangements?

A. On or about December 29th, 1911.

Q. Did you make any arrangements before or as soon as you were advised that the purchaser had established credit for the payment for the flour.

A. The practical agreement was not closed until December 29th, but there were cables passed some time previous to that date, through Mr. Ostrander, who testified this morning?

Q. Are there any regular lines of freight or other steamers operating between Puget Sound ports and Chefoo?

A. Not for the last three years, to my personal knowledge.

Q. In order to transport this order of flour, what was it necessary to do? [72]

A. It was necessary to either engage space on some vessel calling at North China ports, or charter an entire vessel.

Q. Will you state to the Court just what steps you took to arrange for the transportation of this flour, and with what degree of diligence, if any, you prosecuted those arrangements.

A. We had some other tonnage for North China and by combining it with this order for 80,000 sacks of "Morjon" there was sufficient to charter a vessel. We immediately took the matter up with all the charter agents on Puget Sound and in San Francisco and we finally decided to charter the Steamship "Indien" for February loading, 1912.

(Deposition of L. P. Baumann.)

Q. Were you advised when the charter-party was closed, on December 28th or 29th, when the "Indien" would arrive at Puget Sound?

Plaintiff objects to this as irrelevant and immaterial because it is immaterial in this case at what time or when the Centennial Mill Company knew, or whether they knew at all.

A. We were cabled information by the agent of her prospective arrival date at San Francisco, which, as I remember, was about January 15th, and that she would positively make early February loading on Puget Sound.

Plaintiff moves to strike out this answer, because it appears to me mere hearsay.

Q. Have you ever examined this charter-party?

A. I have seen it.

Q. Was there any other vessel available for February shipment for Chefoo, other than the "Indien," when [73] this charter-party was negotiated?

A. There probably was at that time.

Q. I notice in this charter-party, to which I call your attention, that it provides: Lay days not to commence before the 10th of February, 1912, except at charterer's option. I ask you if that was the date the vessel was expected on Puget Sound?

A. It was.

Q. The "Indien"? A. Yes.

Q. When were you first informed that the "Indien" would not arrive in time for a February loading, if you were so informed?

Objected to as irrelevant and immaterial as to when

(Deposition of L. P. Baumann.)

the witness was informed, and that his answer must necessarily be hearsay.

A. About January 23d, through the accredited agent of the owner of the vessel.

Q. What was your information—from whom did you receive it?

Objected to as irrelevant and immaterial, and as hearsay.

A. I received my information from Mr. Ostrander stating that the vessel had met with an accident to her machinery at or near Buenos Ayres. And I want to state further that I had on a number of occasions had information from Mr. Ostrander, owing to the fact that we felt the steamer would still get here, my last information, however, being that she would be unable to make February loading.

Plaintiff desires to strike out the answer of witness because it turns out to be mere hearsay, information conveyed to him by a third person. [74]

Q. Well, now, as a matter of fact, Mr. Baumann, when did the “Indien” arrive on Puget Sound?

A. About April 10th.

Q. It came here under that charter?

A. Yes, sir.

Q. When you received information that the “Indien” would not arrive by February 10th, or for certain February loading, what, if any, arrangement did you make for the transportation of this flour, and when did you make it?

A. I immediately got busy with the people that have charters to offer, Balfour, Guthrie & Company,

(Deposition of L. P. Baumann.)

Dodwell & Company, and some others whom I do not recall now, and found there was absolutely no steamer available, or any space for North China or Chefoo, except that Dodwell & Company had the steamer "Harpagus" on berth or would have her on berth, this steamer being expected on Puget Sound ready for loading not later than between the 20th and the 25th of February, barring accidents, and the steamer having good dispatch.

Q. Then what did you do?

A. We finally decided that was the best and only way we could ship, and secured space through Dodwell & Company at \$1 per ton higher freight rate than we had contracted to pay on the "Indien," or something like \$2,000 loss to us.

Q. At the time you engaged the space for this shipment of flour on the "Harpagus" did you believe she would arrive at Tacoma and take the cargo on during the month of February?

Objected to as irrelevant and immaterial. [75]

A. That was our belief.

Q. Had she arrived at Tacoma by the 25th, would she have been able to take this cargo aboard?

A. Absolutely. The cargo was ready, in part at least, by the 15th of February, but owing to the fact that this vessel kept getting a little later all the time, the Mill Company turned on to some other business, but the cargo was all ready and in the warehouse by February 21st.

Q. Had the steamship "Indien" made her charter, would she have been able to have loaded and departed

(Deposition of L. P. Baumann.)

with this cargo prior to March 1st?

A. Absolutely.

Q. Did the Centennial Mill Company have any control over either of these vessels?

Objected to as irrelevant and immaterial.

A. The charter being made in the name of the Centennial Mill Company, Mr. Ostrander as agent (the steamship "Indien" I am speaking of), I will say that this charter-party is the customary one and owing to a clause inserted in all charter-parties, absolving the steamship company from all claims for damages arising from damage to the ship's machinery or consequent delay, we as charterers had no recourse in the matter.

Plaintiff moves to strike out the answer of the witness as not being responsive to the question.

Q. I note in your acceptance of the order of Connell Brothers (Defendant's Exhibit 20) the clause: "All agreements herein contained or implied are contingent upon strikes, accidents and other delays unavoidable or beyond our control." I will ask you [76] what is the custom, if any, of the Centennial Mill Company with reference to the insertion of that clause in all orders for the shipment of goods to the Orient.

Objected to as irrelevant and immaterial, the custom of the Centennial Mill Company having no bearing on the contract between the plaintiff and the defendant in this case.

A. All of our contracts have that clause and condition, which is customary in all contracts covering

(Deposition of L. P. Baumann.)

shipments of goods to the Orient.

The plaintiff now moves to strike all that part of the answer from the words "which is customary, etc.," because not responsive to the question.

Q. Do you think of anything else, Mr. Baumann, material to either of the parties to this controversy? If so, please state it.

A. Yes, I want to say that on referring to your exhibit there; the sales contract between the plaintiff and the defendant particularly provides that this flour was sold "C I F," which means for shipment insurance and freight prepaid, and does not mean for delivery at a certain date. I think that is material in any case of this kind.

Mr. HOLT.—You mean that the words "C I F" do not refer to the day of shipment, but relate to the payment of freight?

A. "C I F" does not refer to the date of shipment. I simply mean that the words "C I F" do not relate to the date of delivery but do relate to the payment of freight and insurance.

Mr. KERR.—I now want to offer in evidence defendant's identified [77] Exhibit 22, being the copy of the charter-party identified by the witness Ostrander this morning as one of the charter-parties executed by him, the other having been sent to the owner at Copenhagen.

Plaintiff objects to this charter-party for the reason that as to it it is irrelevant and immaterial and has no bearing on any issue of the case and is the

(Deposition of L. P. Baumann.)

mere act of third persons and is not binding on plaintiff.

Q. If you have any further matter, Mr. Baumann, which you desire to state to the Court you may now do so.

A. I wish to state that the shipment of this flour was as near a February shipment, under the terms of our contract, as any manufacturer could give, every effort being made that could be made, even at the expense of additional freight money.

Plaintiff objects to this testimony as irrelevant and immaterial and is a volunteered statement of the witness and moves to strike it out. It amounts to a mere expression of opinion on the part of the witness as to whether defendant's action was in compliance with the contract and is not a statement of any fact.

Q. Was there anything within the power of the Centennial Mill Company to have been done, after you chartered first the "Indien" and later the "Harpagus" to have avoided the delay to the "Indien" in the first place or the delay to the "Harpagus" in the second place?

Objected to as irrelevant and immaterial and a mere expression of opinion.

A. No, sir. [78]

Q. Was there any way by which you could have controlled the movement of these vessels so as to cause either of them to arrive at Tacoma, for the purpose of taking on the flour at the due date?

Objected to as irrelevant and immaterial.

A. No, sir.

(Deposition of L. P. Baumann.)

Cross-examination by Mr. HOLT.

Q. You say you arranged on or about December 29th, 1911, for the "Indien," did you?

A. Yes. That is when it was finally closed.

Q. And that was done by means of cable messages between you and the owner?

A. Through Mr. Ostrander, who was acting as our agent.

Q. You personally did not send these cablegrams or receive them? It was all done by him?

A. Yes, sir.

Q. You say that there were no regular lines between here and Chefoo? A. Yes, sir.

Q. There were other boats, were there not?

A. Yes, sir, for the ports to the south and the regular ports but none for Chefoo.

Q. When you found out that the "Indien" would not reach here in time, you made no effort, did you, to obtain a place for this cargo of flour on any other ship except the "Harpagus"?

A. We used every due effort to get it on some other ship,—not for transshipment but for direct shipment.

Q. You found there was no way you could ship it direct? A. No. [79]

Q. You could, however, have shipped for transshipment?

A. I could not say as to that. In the first place Chefoo and North China are closed in the winter time and don't open until some time in April.

Q. You did not answer my question.

(Deposition of L. P. Baumann.)

A. I would not know how to transship flour from Puget Sound to Chefoo; it is not customary at all.

Q. But you wanted to charter an entire vessel because you had a cargo for an entire vessel, that is a fact, is it not, Mr. Baumann?

A. We had an additional cargo for Taku Bar which was practically the same as Chefoo and a combination of the two ports was what was wanted by the steamship lines.

Q. You had a cargo for these two ports and you made no effort to place any part of this cargo in any ship calling at any other port than Chefoo or Taku Bar?

A. There were no direct sailings from Puget Sound.

Q. I am going to ask you if you made any effort—did you make any effort to obtain a place for this cargo, other than on the steamship “Harpagus”?

A. I did not.

Q. You say you were informed by the agent when the “Indien” would arrive. Did you have any other information than what was conveyed to you by the agent?

A. I saw all those telegrams that passed between the owner and Mr. Ostrander as our agent. I saw the charter-party there.

Q. That charter-party was dated December 29. You had no actual information of your own, except what you have said you derived from the agent. Mr. Ostrander, [80] and this charter-party, in reference to the “Indien”—the time she would arrive?

(Deposition of L. P. Baumann.)

A. That is all the information I had, certainly. What more do you expect?

Q. You say that the "Harpagus" was ready—that you learned she was ready and would sail in February, barring accidents. Who told you that, Mr. Baumann?

A. Mr. Haines, General Freight Agent, I think his title is, of Dodwell & Company.

I think that is all, Mr. Bauman.

Redirect Examination.

Q. In carrying on your export business are you obliged to rely to any extent upon cable information in reference to the closing for vessels, when they will arrive and when depart?

Objected to as irrelevant and immaterial.

A. In all charters made that is absolutely the only way.

Q. Are there any steamers known as "tramp" steamers adapted to the carrying of flour to the ports of the Orient from the ports of Puget Sound and San Francisco? A. Yes.

Q. When you close for a vessel to carry a cargo from Puget Sound to the North of China, on what kind of information do you have to rely?

Objected to as irrelevant and immaterial.

A. When we are treating with the owner we have to rely upon cablegrams entirely. When we treat with agents on this side we treat with them and they treat with the owner by cable. [81]

Q. Now, counsel asked you whether you had made any effort to get space on any other vessel going to

(Deposition of L. P. Baumann.)

China. Considering the time of year and the location of the port of Chefoo, after you were advised of the certain delay of the "Indien" could you have shipped this flour with a view to transshipment, so that it would have arrived in China before the time it did arrive? A. I don't believe it.

Mr. HOLT.—Q. You did not try?

A. I did not try because I considered it impracticable.

Q. It would not have been impracticable had there been a boat at hand?

A. Let me say to you, Mr. Holt, there was absolutely no space to be had in any regular line steamer calling at a regular port on or about January 23d for February shipment, for transshipment to Chefoo.

Q. How do you know this, Mr. Baumann? Did you try to ascertain?

A. For the simple reason that we have had to engage space three or four months ahead for the last year.

Q. But you made no effort to ascertain whether you could ship this cargo or any part of it on any other boat to any port in China?

A. We made this effort: Daily, almost, I telephoned to the different steamship agents asking them if they had any space for the Orient in February. Their replies were: "We are full up and running over." [82]

**Defendant's Exhibit No. 3 [Copy of Telegram from
H. F. Ostrander to Parrott & Co., December 7,
1911].**

Copy of telegram from Ostrander, Seattle, to Parrott & Company, December 7, 1911, as follows:

Please wire when Indien due yours and time you estimate discharge will take.

**Defendant's Exhibit No. 4 [Copy of Telegram from
Farrott & Co. to H. F. Ostrander, December 7,
1911].**

Copy of telegram from Parrott & Co., San Francisco, to H. F. Ostrander, December 7, 1911, as follows:

H. F. Ostrander,
Seattle, Wash.

Indien due about January twenty-fifth discharge estimated about twelve days.

PARROTT & CO. [83]

**Defendant's Exhibit No. 5 [Letter Dated December
7, 1911—Parrott & Co. to H. F. Ostrander].**

PARROTT & CO.

Export and Import Merchants.

320 California St.

San Francisco, U. S. A.

Cable Address:

“PARROTT” San Francisco

December 7, 1911.

Mr. H. F. Ostrander,
Seattle, Wash.

Dear Sir:

Acknowledging receipt of your wire of even date,

we beg to enclose copy of telegram just sent to you,
which is self explanatory.

Yours very truly,

PARROTT & CO.

A. S. MENZIES,

Vice-president.

BH/N.

Enc. 1. [84]

**Defendant's Exhibit No. 6 [Translation of Code
Telegram, December 26, 1911].**

Translation of code telegrams, December 26, 1911,
of Ostrander, Seattle, to East Asiatic Company,
Limited, Copenhagen, as follows:

JELSTRUP	Mr. Otto Jelstrup
ULOWK ITWEP	Referring to our telegram of Dec. 9th
INDIEN	S/S INDIEN
ODACK OGSER	Have you fixed? If not
OSCAH IJLOY	Make me best offer full and complete cargo of
ODASB TAKU	Sacks of flour Taku Bar
CHEFOO	Chefoo
OSTRANDER	Ostrander

Defendant's Exhibit No. 7 [Translation of Code Telegram, December 27, 1911].

Translation of Code telegram, December 27, 1911, of East Asiatic Company, Limited, to Ostrander, Seattle, as follows:

INDIEN	SS INDIEN
PERNEANDO	With firm offer in hand
IZSAP USPEB	\$5
	per ton of 2240 pounds
GISELBERT	quick despatch loading and discharging.
HUMORISME	might entertain [85]

Defendant's Exhibit No. 8 [Translation of Code Telegram, December 27, 1911].

Translation of code telegram, December 27, 1911, of Ostrander, Seattle, to Orient, Copenhagen for East Asiatic Company, Limited, as follows:

INDIEN	S/S INDIEN
OSFIMIZSAP	Offer firm subject immediate reply
	\$5.00
IRUKT EZIGZ	Commission 5%
	Tacoma & Seattle
IZFID URIGY	To discharge at 2 ports
	1800 tons
ONNAJ CHEFO	Maximum
	Chefoo
AKERE ONADY	10
	working days Sundays and holidays excepted for loading and to discharge in ac-

cordance with the custom
of the port

OBVAN OKZEK	Except load per day 1000 tons
IVPHA UHROT	Free of despatch money Shippers
UZJOS OCHLO	wish Feb. 15th
IHBFO IFSER	Cancelling What is best you can do?
OSTRANDER	Ostrander [86]

**Defendant's Exhibit No. 9 [Translation of Code
Telegram, December 28, 1911].**

Translation of code telegram, December 28, 1911,
addressed Orient, Copenhagen for East Asiatic Com-
pany, Limited, as follows:

ITFUB IZSAP	Counter offer \$5 25¢
IKEPT OHFOC	Cannot increase
OLLYV OVKUG	loading or
OFLUS IVVIK	guarantee discharge
CHINWANTAO	Chinwantao
ICUMZ OGWAT	I agree to if you do not
ICKES OSCAH	accept make me best offer
ILFAD IVJOY	Time charter delivery at (-) and rede- livery at (-)

EZIBT TAKU	Tacoma Taku Bar
DEXTERITE	Unless you are quick fear will be closed elsewhere
OKUHV IFSCA	Liners This is the very best that can be done [87]

**Defendant's Exhibit No. 9a [Translation of Code
Telegram, December 28, 1911].**

Translation of code telegram, December 28, 1911,
addressed Ostrander from East Asiatic Company,
Limited, as follows:

ISHCA OSANS	Considering Have got offer
EMJOB UZHEP	London will not
OCULD OZUMS	fix at present
UTNYV IZSAP	unless \$5.00
IKFUN OYEFW	50¢/ 2 ports
ONGOF IHBFO	March 10th cancelling
AKEPK OMZSO	8 working days for loading
IVYUP IVPFA	discharge per day 800 tons free of despatch money
OVEPH IVVIK	Must have option of discharge

CHINWANTAO	Chinwantao
IF TAKU	if Taku Bar
ICEBOUND	icebound
WIRE	wire [88]

Defendant's Exhibit No. 10 [Translation of Code Telegram, December 29, 1911].

Translation of code telegram, December 29, 1911, addressed Ostrander from East Asiatic Company, Limited, as follows:

INDIEN	INDIEN
ICLIV IZSAP	we accept \$5.
IKEPD IRVEC	25¢ Total commission
OWOPF ODKIT	5% Freight in advance
IJLOY ODASB	Full and complete cargo (of) sacks of flour
EZIGZ CHEFO	Tacoma and Seattle Chefoo
AND TAKUBAR	and Taku Bar
OPTION	option
CHINWANTAO	Chingwantao
IF ICE BOUND	if ice bound
AKFRE ONADY	10 working days Sundays & holidays excepted, for loading and to discharge in accordance with the custom of the port

IVZYZR IVPHA	as fast as steamer can dis- charge
	free of dispatch money
ONGOF IHBFO	10th March
	cancelling
ILDOG	Subject to approval of char- ter and charterers [89]

**Defendant's Exhibit No. 11 [Translation of Code
Telegram, December 29, 1911].**

Translation of code telegram, December 29, 1911,
addressed Orient, Copenhagen for East Asiatic Com-
pany, Limited, as follows:

DEGOLLINAS	Charter is confirmed Copies by first mail.
UHROT	Shippers
CENTENNIAL	Centennial
MILLS ILOCF	Mills Co. chartering
PAPIRIOS	in my name [90]

**Defendant's Exhibit No. 12 [Letter from The East
Asiatic Company, Ltd., to H. F. Ostrander].**

(Letter from The East Asiatic Company, Limited, to
Mr. H. F. Ostrander, December 30, 1911.)

(Ansd. Seattle,

Jan. 22, 1912)

Copenhagen, 30' December 1911.

(Recd. Jan. 17, 1912.

Seattle)

Mr. H. F. Ostrander,
Seattle, Wash.

Dear Sir,

S. S. "Indien." We confirm telegrams exchanged

as per copies enclosed, resulting in our fixing the above steamer, 6/6100 tons cargo capacity for a full and complete cargo of flour in sacks a' \$5.25 per ton a' 20 cwt. free of address commission, commission 5% and freight to be paid in cash in advance upon completion of loading without any deduction whatever. Loading at Seattle & Tacoma (2 places) to Chefoo & Taku bar with option of discharge the Taku parcel at Chinwantao, if the first place upon arrival of the steamer should be icebound. 10 days for loading, only Sundays and holidays excepted, and the discharge to be effected as fast as steamer can deliver, and we understand that efforts will be made by shippers to arrange 1000 tons daily discharge.

The steamer is expected to have left Buenos Aires to-day for San Francisco via Coronal, and eventually a nitrate port, and we expect her discharged at San Francisco about the 15/20th February.

We made this fixture subject to the terms of the charter-party, which we are now expecting, and we hope same does not contain any terms or conditions to which we cannot agree, so we can finally confirm this fixture. We note the shippers are Messrs. Centennial Flouring Mills of yours, but you will appear as charterer. [91]

H. F. Ostrander, Esq.

30/12/1912.

We are sorry that you did not wire us at once the best terms you could obtain for us, as we after you offered us firm \$5.—received advise from London that better terms could be obtained through their medium, and we therefore had to wire you back to that effect.

Wishing you a happy and prosperous New Year,
we are, dear Sirs,

Yours faithfully,

AKTIESELSKABET

DET OSTASIATISKEKOMPAGNI

(The East Asiatic Company, Limited.)

Attached to this exhibit are copies of exhibits,
namely: Defendant's Exhibits Nos. 6, 7, 8, 9, 9a, 10
and 11. [92]

**Defendant's Exhibit No. 13 [Letter (Unsigned)
Dated January 15, 1912, to Messrs. Parrott &
Co.].**

Jan. 15, 1912.

Messrs. Parrott & Co.,
San Francisco, Cal.

Dear Sirs:

Sometimes since you advised me that the S. S. INDIEN was due at yours about January 25.

I note in the GUIDE that she is last reported as having arrived at Buenos Ayres December 15th. I should greatly appreciate your giving me by letter the last advices as to her position and when you make her due at yours. As you will doubtless be advised in due course, I have chartered this vessel for a trip across to the Orient, Seattle and Tacoma loading.

Thanking you in anticipation, I am,

Yours very truly,

HO/HS [93]

**Defendant's Exhibit No. 14 [Two Letters from
Parrott & Co. to H. F. Ostrander].**

(Recd. Jan. 22, 1912, Seattle.)

PARROTT & CO.

Export and Import Merchants,

320 California St.

San Francisco, U. S. A.

Cable Address.

“PARROTT” San Francisco.

January 18, 1911.

Mr. H. F. Ostrander,
523 Bailey Building,
Seattle, Wash.

Dear Sir:—

We beg to acknowledge your favor of the 15th and regret that we cannot give you any information regarding the present position of the “Indien.” Our impression is that the vessel sailed from Buenos Aires sometime before December 25th, but we have had no direct advices of the same. We will take much pleasure in advising you as soon as we hear further about her.

Yours very truly,

PARROTT & CO.

R. B. HINE,
President.

RBH/N [94]

(Recd. Jan. 26, 1912, Seattle.)

PARROTT & CO.

Export and Import Merchants.

320 California St.

San Francisco, U. S. A.

January 23, 1912.

Mr. H. F. Ostrander,
523 Bailey Building.
Seattle, Wash.

Dear Sir:

We beg to acknowledge receipt of your favor of the 15th inst. We have just received a cable from the East Asiatic Co. Ltd., Copenhagen, advising that the s/s "Indien" has been detained for repairs at Buenos Aires and that she will not leave there before next Saturday. The East Asiatic Co. gives us early in March as the time of her approximate arrival here.

Yours very truly,

PARROTT & CO.

R. B. HINE,

President.

BH/N [95]

**Defendant's Exhibit No. 15 [Letter Dated Tacoma,
April 11, 1912—Canfensly to H. F. Ostrander].**

(Recd. Apr. 11, 1912, Seattle)

S. S. "INDIEN"

Tacoma 11th April 1912.

H. F. Ostrander, Esq.
here.

Der Sir.

I beg to inform you that the above named Steamer under my command arrived here today at 0'30 p. m.

and is ready for declaration & to load cargo under Charter Party Seattle Dec 29-1911.

I remain dear Sir,

Yours faithfully,

CANFENSLY,

Master. [96]

Defendant's Exhibit No. 16 [Letter Dated San Francisco December 27, 1911—L. R. Cofer to Messrs. Connell Bros. & Company].

**WELLS-FARGO-NEVADA NATIONAL BANK
OF SAN FRANCISCO.**

Foreign Exchange Department:

L. R. COFER, Manager.

San Francisco, December 27, 1911.

Messrs. Connell Bros. & Company,

Seattle, Wash.

Gentlemen:—

We beg to inform you that we have been requested by the Russo-Asiatic Bank at Shanghai to negotiate as offered your bills drawn in duplicate on Messrs. H. Diederichsen & Company, Chefoo, to the extent of G \$83,000. (Eighty-three Thousand Dollars U. S. Gold only). The shipment is described as 80,000 bags flour to Chefoo, shipment February/March, 1912. Bills are to be drawn at 3 days' sight and are to be accompanied by the following documents, deliverable against payment:—

Invoices,

Policy of Marine Insurance.

and full sets of bills of lading, which are to be made out to order and blank endorsed. This au-

thority to remain in force till May 1st, 1912.

“Bills are without recourse to drawer,” and bear the clause “With interest at 6% per annum added thereto from date of drafts to approximate due date of arrival of cover in Seattle.

Please note that this notification is not to be considered as a confirmation of any credit by the Wells-Fargo-Nevada National Bank of San Francisco.

All drafts under this authority must specify that they are drawn under R A B Advice No D/C 7.

Kindly hand in this letter with your drafts in order that the amount of same may be endorsed on the back. We shall be glad to serve you in this connection.

The Seattle National Bank, Seattle, Wash., have been informed of this authority.

Yours very truly,

L. R. COFER,

Manager Foreign Department.

LRC/NS.

(Recd. Dec 30, 1911.

Answered ———.) [97]

**Defendant's Exhibit No. 17 [Letter Dated Seattle,
December 30, 1911—C. L. La Grave to Messrs.
Connell Bros. & Co.].**

(Recd. Dec. 30, 1911

C. M. Co. Seattle)

THE SEATTLE NATIONAL BANK.

No. 4229.

UNITED STATES DEPOSITARY.

Seattle, Washington, Dec. 30, 1911.

Messrs. Connell Bros., & Co.,

817 Western Ave.

City.

Gentlemen:—

We are in receipt of a letter from our San Francisco correspondent, the Wells, Fargo Nevada National Bank, requesting us to negotiate your Three Days Sight Drafts on Diederichsen Co., Chefoo, covering shipment of 80000 bags of flour, as per instructions in their letter of the 27th, inst. addressed to you, of which they have sent us a copy.

Yours truly,

C. L. La GRAVE,

Asst. Cashier.

LaG :G

(Recd. Jan. 3, 1912, Answered ———) [98]

Defendant's Exhibit No. 18 [Letter Dated October 14, 1911—Connell Bros. Company to Centennial Mill Company].

Oct. 14—1911.

Centennial Mill Company,
City.

Gentlemen:—

We are enclosing herewith order phoned you yesterday for 80,000 Morjon at \$4.15 per bbl. c. i. f., Chefoo, for Feburary shipment.

We requested that a confirmed banker's credit be placed with us or the credit approved by your Mr. Burt, and hope this can be arranged to your satisfaction in due time.

With kind regards, we remain,

Yours very truly,

MJC/C.

CONNELL BROS. COMPANY,

By [99]

IMPORTER AND EXPORTER.

Seattle, Wash. 10/14, 1911.

M.... Centennial Mill Co.

Ship to Connell Bros. Co.

At Chefoo.

Order received by cable 10/13, 1911, By Letter.

Forward to Mill by.... " 190 , By Letter.

Mill accepts by..... " 190 , By Letter.

M. J. C. " by..... " 190 , By Letter.

When Ship: Feby. Via S. S.

Terms: To be arranged.

.....

.....Salesman Story.....

80000 Scs. Morjon. 415.

cif. [100]

**Defendant's Exhibit No. 19 [Letter Dated Seattle,
October 16, 1912—Centennial Mill Company to
Messrs. Connell Bros. Co.].**

COPY.

Seattle, Oct. 16th, 1912.

Messrs. Connell Bros. Co.,

City.

Gentlemen:

We have your favor of the 14th inst. together with order for 80,000 1/4s "Morjon" for February shipment. This sale was made on either a confirmed bank credit or our Mr. Burt's O. K. as to the buyer. We presume that this will be cleared up in ample time.

Yours very truly,

CENTENNIAL MILL COMPANY.

By L. P. BAUMANN,

Asst. Gen. Mgr.

B/G.

Enc. [101]

Defendant's Exhibit No. 20 [Acknowledgment of Order].**COPY.****ACKNOWLEDGMENT OF ORDER.**

Seattle, U. S. A., Oct. 16, 1911. No. 308.

Buyer Connell Bros. Co.

Chefoo.

Unless advised to the contrary
shipment may be expected.

Sold by Connell Bros. Co. Per Str.

Sailing

Shipment

February

Port

Chefoo

Payment

Value for
Marine Ins.
\$91,000.Price.
4.15

Brand.

Grade.

Sacks.

c. i. f.

Morjon

A

80,000

All agreements herein contained or implied are
contingent upon strikes, accidents and other delays
unavoidable or beyond our control.

This is an exact copy of your order as entered by
us.

ERRORS: If any are discovered please notify us
at once.

CENTENNIAL MILL COMPANY.

(Sgd.)

By L. P. BAUMANN.

Confirmed bank credit or if Burt passes buyer
O. K.

(Sgd.)

C. M. CO.

B. [102]

Defendant's Exhibit No. 21 [Invoice of Flour].

COPY.

No. 5557 "T."

Order No. 308. Seattle, U. S. A., Feb. 28, 1912.

INVOICE OF FLOUR Shipped by the UNDER-
SIGNED.

Per Steamer "HARPAGUS."

From Seattle To Chefoo

By order and for account and risk of

Messrs. Diederichsen & Co.,
Chefoo.

Sacks.	Barrels.		Price.	Amount.
80,000	20,000	"Morjon"	4.15	\$83,000.00
			c. i. f.	

1 bundle empty sax gratis.

Salesman's Copy.

Payment 3 dys. S/D Russo-Asiatic Bank.

Insurance No. 90822, "FIREMEN'S FUND,"
\$91,000.

CENTENNIAL MILL COMPANY.

Shipper. [103]

Defendant's Exhibit No. 22 [Steam Charter-party].

STEAM CHARTER-PARTY.

WHEAT, &c.

Seattle, Dec. 29, 1911.

This Charter Party, this day made and concluded upon between The East Asiatic Co., Ltd., owners of the steamship or vessel called the Indien of the measurement of 3613 tons net register or thereabouts classed 100 A-1 of the first part, and H. F. Ostrander of the second part

1. WITNESSETH, that the said vessel being tight, staunch, strong, and every way fitted and provided for the voyage, shall, after discharge of inward cargo or ballast, be made ready, and shall receive on board at Tacoma, and/or Seattle (the charterers having the full reach of the vessel's hold, and 'tween decks from stern to stern, together with the poop and houses on deck, except cabin and such space as is actually necessary for the crew and stores, sails and water for the voyage), a full and complete cargo, not exceeding 6300 tons, and not less than 6000 tons (which she can reasonably stow or carry) of Flour in sacks, which the said parties of the second part bind themselves shall be shipped, and being so loaded shall therewith proceed to Chefoo and Taku Bar, as ordered by Charterers on signing Bills of Lading, or as near thereunto as she may safely get, and there deliver the same at any berth or berths, or into any craft, steamer, floating store, docks, wharf, or pier, where she can safely lie, always afloat, as may be directed by Charterers' Agents, to whom notice is to be given of the vessel being ready to discharge, and be paid freight in full of all port charges, including dockage, pilotage, towages, primage, as hereinafter provided; at the rate of

5 Dollars 25 Cents, Two Ports

per ton of 2,240 lbs. English gross weight delivered, and weighed as customary.

2. Freight payable in cash, or the equivalent in local currency, without discount, on signing Bills of Lading.

3. In the event of vessel, on arrival, being de-

tained in quarantine for a period of twenty-one days, and that period ending after the cancelling date mentioned in Clause 8, Charterers to have the option of cancelling or maintaining this Charter Party on the cancelling date.

4. Upon discharge of inward cargo, Captain shall give Charterers usual written notice thereof, accompanied by certificate of Charterers' competent Surveyor, that vessel is in good general condition to receive cargo for the contemplated voyage.

The vessel to be well stowed and dunnaged, and certificate thereof and of good general condition, draft of water, ventilation and fitness to make the voyage, to be furnished to Charterers from said Surveyor. Vessel to pay all Surveyor's fees. Vessel to employ Stevedore satisfactory to Charterers, provided that the charge to [104] be paid shall not exceed that current at the time, and that the stowage shall be under the Captain's supervision and direction.

5. If the Captain or Charterers be dissatisfied with any certificate provided for above, the matter in dispute shall be submitted at once to two arbitrators, who shall be qualified Marine Surveyors, one chosen by the Captain and one by the Charterers, who if they cannot agree, shall call upon a third arbitrator, also a Surveyor; a majority decision and certificate shall determine the matter in dispute, and the cost of the said special survey shall be borne by the party against whom said decision may be rendered. Should the vessel fail to pass satisfactory survey, or in case of submission to arbitration should

the decision be against the vessel, and should she be detained more than ten weather working days for repairs over and above customary time occupied in discharging inward cargo, this charter to be void at Charterers' option, such option to be declared at the expiry of said ten days. If after any matters of dispute have arisen, there shall be a failure by either party to nominate an arbitrator within three days (Sundays and Holidays excepted), the arbitrator named by the other party shall be the sole arbitrator. Lay days, if current, shall count during such time as the disputed matters shall be under arbitration, if the final decision be in favor of vessels; provided, however, that due allowance be made for time consumed by her in the nomination of arbitrator. The award of arbitrators shall be conclusive.

6. After discharge of inward cargo has been finally completed, vessel to proceed to such usual loading place or places where vessel can safely load, always afloat, as may be ordered by the Charterers, at Tacoma, and/or Seattle, and there receive the cargo in manner customary alongside, afloat and/or from the wharf.

7. Vessel to accept usual berthing and other loading conditions, and the use of all hatches and side ports to be given Charterers. Ten (10) working days (Sundays, Holidays and rainy days, not to be counted as lay or working days), to commence twenty-four hours after the inward cargo shall have been finally discharged, and the Captain has given Charterers written notice accompanied by Survey-

or's certificate, that his vessel is ready to receive cargo, are to be allowed Charterers for loading at places as hereinbefore provided, but should the loading be completed in less time Charterers have the privilege of detaining the vessel until the expiry of said lay days.

8. Lay days not to commence before the 10th Feby., 1912, except at Charterers' option. Should the vessel fail to arrive and be ready to load at first loading port as ordered by Charterers on or before noon on the 10th March, 1912, Charterers to have the option of cancelling or maintaining this Charter on notification thereof being given them by the Master.

9. Bills of Lading to be duly and promptly signed by the Master at any rate of freight, without prejudice to this Charter Party, but at not less than the chartered rate, unless any difference in freight be paid in cash before signing. [105]

10. If claim shall be made by Master that cargo shipped is short of chartered requirements, the said matter shall, unless conceded and arranged by Charterers, be submitted at once to arbitrators, who shall be qualified Marine Surveyors, to be chosen as already provided in case of survey. Their reward shall be conclusive, and Charterers, if the decision be against them, shall furnish necessary additional cargo, or settle with the Master for dead freight before final Bills of Lading shall be signed. Failure on the part of either party to this agreement to nominate an arbitrator within twenty-four hours, shall be deemed a waiver of all objections on the part

of said party. Time lost in such proceedings, if lay days shall have expired, but not otherwise, shall be paid for at demurrage rates by the Charterers, if the decision be given against them, prior to the signing of final Bills of Lading. The expenses of the arbitration shall be paid by the party against whom the decision shall be given.

11. All needful funds, if required for ship's ordinary disbursements at Tacoma and/or Seattle, to be advanced by Charterer and to be subject to interest charge at current short time rate; amount of such advances to be endorsed on Charter Party, if required, and to be deducted out of first earnings thereunder. The Master to execute to Charterer, if required, a memorandum in writing given to him or his assigns, a lien upon the ship and freight as a first charge upon the same, for the payment of any advances as aforesaid. It is expressly agreed that the receipt of the Master shall be conclusive and binding upon the owners, and they shall be debarred as between them and Charterers, or their Agents, from inquiring into the necessity for, or the due appropriation of, such sums of money acknowledged by the Master as received. Charterers or their Agents to do ship's inward and outward business at port or ports of loading on customary terms, say \$100.00.

12. Vessel to be cleared at the Custom House at Tacoma and/or Seattle, in the name of the Charterer. The Master to report to Charterers or their Agents, immediately on arrival of the vessel at port of discharge. Vessel to discharge afloat with dispatch

according to the custom at port of discharge; cargo to be delivered at ship's tackles. All lighterage to be at the expense and risk of receivers of cargo, except in case of average, when lighterage shall be borne by whom it may concern.

13. It is agreed that for each and every day's detention or demurrage at the port of loading, by default of said parties of the second part, or their agents, four pence per net register ton, or its equivalent, per running day shall be paid (or *pro rata* for part thereof), day by day by said parties of the second part, or their agent, to said party of the first part, or his agent, and such claim shall, if disputed, be settled by arbitrators, in Seattle, and there paid, and shall not be elsewhere enforceable. The reference shall be to two arbitrators, of whom each party shall appoint one, and in case they are unable to agree, the arbitrators shall appoint an umpire, and the decision of the arbitrators, or umpire, as the case may be, shall be final and binding. If either party shall within three clear days after the other party has given notice in writing thereof to the other party, then the arbitrator appointed shall be at liberty [106] alone to proceed with the reference and his decision therein shall be final and binding. It is also agreed that for each and every day's demurrage, or detention, at port of discharge, four pence per net registered ton, or its equivalent, shall be paid by the holders of Bills of Lading, or their agents, to said party of the first part, or his agent. The shipowners shall have a lien on the cargo for all freight, detention, demurrage, and dead freight,

if any, but upon shipment of the cargo, and acceptance by the Master, and on settlement of dead freight, if any, or of any freight not represented by Bills of Lading, and of demurrage, if any, at port of Loading, Charterers shall be deemed to have fulfilled this Charter Party, and shall be under no liability thereafter, under any provisions hereof, for any matters, past or future, or for any loss, damage, or other claim of breach of Charter Party.

14. Lay or working days shall not count at ports of loading or discharge, during any time when the supply or bringing by rail, craft, or otherwise, to port of loading or alongside the vessel, or the loading of the cargo or intended cargo, or the unloading of the cargo, or any part thereof, is delayed by the act of God, war, restraint of princes, rulers, or people, force majeure, blockade, quarantine, earthquake, inundations, storms, rain, snow, ice, fire riots, strikes, lockouts, civil commotions, political disturbances or impediments, holidays (ecclesiastical or civil), cessations or stoppages of labour, epidemics, perils of the seas, railway accidents or impediments, or any other hindrance of whatsoever nature beyond the Charterers' control. It is further declared, that in the event of any war being or becoming existent between the nation to whose flag the chartered vessel belongs and any European power, or China, or the United States of America, in the case of a vessel in the ports of Tacoma and/or Seattle, Charterers have the option of cancelling this Charter at any time, provided that they give notice to the owners that they cancel within fourteen

days after declaration of war; and in the case of vessel arriving after war has been declared as above, Charterers have the option of cancelling this Charter, at any time not later than fourteen days after declaration of war, or forty-eight hours after notification of arrival has been given to Charterers by the Master, Owners, or Agents, whichever shall last expire.

15. This Charter Party is subject to the London Conference Rules of Affreightment, 1893, as endorsed thereon.

16. A Commission of 5 per cent (5%) is due to Charterers on estimated amount of freight under this Charter, in U. S. gold, and payable in Seattle on steamer being loaded, ship lost or not lost.

17. Charterers to have the option of underletting the whole or, part of the steamer, and the Master to sign Bills of Lading either for the whole or part of his cargo as required by Charterers' Agents at any rate of freight required without prejudice to this Charter Party, but, not (on average) under chartered rates unless difference be paid in cash before signing Bills of Lading. [107]

18. The Captain of the telegraph "Ostrander, Seattle," for orders as to loading port from his last port of discharge or port of call.

19. Penalty for non-performance of this Agreement, estimated amount of freight.

20. Amount of cargo for first port viz: Chefoo not to exceed 1800 tons.

21. Should Taku Bar be iceclosed on arrival of steamer liberty granted to discharge at Chinwang-

tao or at Charterers' option demurrage to be paid pending opening of the port.

22. Master to notify consignees as per Bills of Lading immediately on arrival at ports of discharge.

H. F. OSTRANDER.

Witness:

H. E. SPRINGER.

The Original Charter Party in our possession.
[108]

[Stricken Portions of Deposition of M. J. Connell.]

Upon motion of the plaintiffs the Court struck from the deposition of M. J. Connell and refused to receive in evidence the following testimony given during the direct examination of said witness, to wit:

Q. Assuming that the order placed with your Shanghai house by Diederichsen & Company contained this clause: "All agreements herein contained or implied are contingent upon strikes, accidents and other delays unavoidable or beyond our control." I will ask you to state whether it was within your power to have avoided the delay of the arrival of the "Indien" on Puget Sound for the purpose of taking this flour.

Objected to by plaintiff as irrelevant and immaterial.

A. No, sir.

Q. Do you know, Mr. Connell, why you put that clause in all orders for merchandise of this character to be shipped to the Orient?

Objected to by plaintiff because the purpose of Mr. Connell in putting it in is irrelevant and immaterial, unless it was a matter of understanding or agreement between himself and the plaintiff on that

subject so as to make it a part of the contract.

A. Because we do not control the steamships—have no control over them and can only ship as the ships sail.

Q. To what extent, if any, is that clause inserted in all orders for merchandise shipped to ports to which no regular lines of steamers operate?

Objected to as irrelevant and incompetent.

A. On all orders and to every port.

Q. Could an exporter from Puget Sound ports handle his product—such as flour—upon orders for shipment to [109] ports in the Orient to which no regular line of steamships run, and conduct an export business unless they inserted in the agreement such contingencies as strikes, accidents and accidents beyond their control?

Objected to as irrelevant and immaterial.

A. No, sir.

Second Exception.

To which said ruling of the Court the defendant then and there excepted.

[Stricken Portions of Deposition of L. P. Baumann.]

Upon motion of the plaintiffs the Court struck from the deposition of L. P. Baumann and refused to receive in evidence the following testimony given during the direct examination of said witness, to wit:

Q. Was there any thing within the power of the Centennial Mill Company to have been done, after you chartered first the “Indien” and later the “Harpagus” to have avoided the delay to the “Indien” in the first place or the delay of the “Harpagus”

in the second place?

Objected to as irrelevant and immaterial and a mere expression of opinion.

A. No, sir. [110]

Q. Was there any way by which you could have controlled the movement of these vessels so as to cause either one of them to arrive at Tacoma, for the purpose of taking on the flour at the due date?

Objected to as irrelevant and immaterial.

A. No, sir.

Third Exception.

To which ruling of the Court the defendant then and there excepted.

Thereupon each and all of said depositions and exhibits, with the exception of the aforesaid portions of the depositions of M. J. Connell and L. P. Baumann, were admitted and read in evidence.

This concluded the evidence and the foregoing constitutes all the evidence received at said hearing. Both parties rested and on the 2d day of June, 1913, said cause was argued by counsel for both parties and submitted to the Court for decision.

And be it further remembered that thereafter, to wit, on the 9th day of June, 1913, the Court did render its decision and judgment, holding, finding and deciding that the defendant had committed such a breach of the terms of said contract as to shipment of the flour mentioned therein as would render it liable to the plaintiffs in damages if damages had in fact been sustained by the plaintiffs.

Fourth Exception.

To which ruling of the Court the defendant then and there excepted. [111]

[Testimony.]

And be it further remembered that thereafter on the 19th day of June, 1913, this cause again came on for trial in said Court at Shanghai, China, under the stipulation aforesaid and for the hearing, submission and determination by the Court of the issue mentioned in the second paragraph of said stipulation, Messrs. Jernigan & Fessenden appearing as counsel for the plaintiffs and Messrs. Fleming and Davies appearing as counsel for the defendant, and the following proceedings were had, to wit:

[Testimony of A. Graeber, for Plaintiff.]

A. GRAEBER, called as a witness on behalf of plaintiff and duly sworn, testified as follows:

(By Mr. FESSENDEN.)

Q. Mr. Graeber, you are the manager of H. Diederichsen & Company at Chefoo, China, are you not? A. Yes, sir; I am.

Q. And how long—for how many years have you been manager for H. Diederichsen & Company at Chefoo, China? A. For eight years.

Q. Continuously? A. Continuously.

Q. And you arranged this contract for flour on behalf of H. Diederichsen & Company with Messrs. Connell Brothers which is the subject matter of this suit, did you not? A. Yes, sir; I did.

Q. Can you state when you first received information of the date of the departure of the "Harpagus," the steamer carrying this flour that you bought of Connell Brothers?

(Testimony of A. Graeber.)

A. In the beginning of April, about the 7th or 8th of April, we heard that the steamer had not left in [112] February but some time in March, 1912.

Q. From what source did you get that information?

A. First from the Chinese buyers who wired on the 29th of March through the American Consul at Chefoo to the Harbor Master at Seattle inquiring as to what date, as to the date of the departure from Seattle of the "Harpagus."

Mr. FLEMING.—I move to strike that answer out, your Honor, on the grounds that it is hearsay and I cannot see what bearing this would have on the question of damage, as your Honor has already held that the shipment was not made in time.

Mr. FESSENDEN.—It is immaterial as to the question of damages but it is leading up to show exactly what the plaintiffs did in connection with either accepting the cargo or refusing it. This is merely leading up to show what they did when they found there was a breach of contract. However, I have no objection to striking that portion of the answer out as to where the Chinese buyers got their information.

The COURT.—I will permit this witness to state the first information he had as to the fact that the shipment of flour was not made within the period of time fixed by the contract—that **may stand**. That part of the answer which relates to what other people did will be stricken out. To that extent the motion is granted.

(Testimony of A. Graeber.)

Mr. FESSENDEN.—But the part that he heard this from Chinese buyers will remain, your Honor?

The COURT.—Yes; that portion will remain.

Q. Did you have any information or notice from any other source than from the Chinese buyers?

A. Secondly, after getting word from the Chinese buyers [113] we got word from Connell Brothers & Company's Shanghai Office that the steamer "Harpagus" had left Puget Sound on the 14th day of March, 1912.

Q. After receiving that message what did you do?

A. I wired Connell Brothers & Company in Shanghai that we were having considerable trouble with the Chinese buyers and we would refuse acceptance of the cargo. On the 17th day of April, 1912, I wired Connell Brothers & Company at Shanghai again that the cargo was there at their disposal.

Mr. FESSENDEN.—Mr. Fleming, I have spoken to you before about some copies of telegrams we have and I want to put these two in evidence and have them marked Plaintiff's Exhibit "B" and Plaintiff's Exhibit "C." No objection is made to their being copies?

Mr. FLEMING.—None at all, but we object to them on the grounds that such evidence is immaterial, irrelevant, incompetent and has no tendency in any way to establish damages in this case.

The COURT.—I will admit the copies of telegrams in evidence and if not properly connected up you can move to have them stricken from the record. The Court believes they are admissible to show the

(Testimony of A. Graeber.)

attitude taken by the plaintiff which may or may not have bearing upon the question of damages suffered as will appear undoubtedly later in this record.

Mr. FLEMING.—Save an exception.

Mr. FESSENDEN.—Q. Now, Mr. Graeber, you had paid for this flour before you learned of the date of the departure of the “Harpagus” from some port in America? A. Yes, sir.

Q. Did you receive any reply to or instructions from [114] Connell Brothers & Company at Shanghai in relation to the contents of your cablegrams, Plaintiff’s Exhibits “B” and “C”?

A. No reply to the telegram of April 17th whatsoever.

The COURT.—Q. You received no reply to those telegrams?

A. No reply to the last telegram, April 17th. They never confirmed our last telegram.

Mr. FESSENDEN.—Q. Did you make any protest as to the payment of this money to cover the shipment of flour?

A. Yes, sir; we protested. We lodged our protest with the American Consul at Chefoo.

Mr. FESSENDEN.—We offer in evidence, if your Honor please, the original protest lodged with the American Consul at Chefoo referred to by the witness, and ask to have it marked as an exhibit in this case.

(Marked and filed Plaintiff’s Exhibit “D.”)

Q. Now, Mr. Graeber, on what date did the “Harpagus” arrive at Chefoo?

(Testimony of A. Graeber.)

A. On the 16th day of April in the evening.

Q. Prior to the arrival of the "Harpagus" at Chefoo had you sold any of this cargo of flour?

A. Yes, sir; we had sold seventy-five thousand sacks.

Mr. FLEMING.—We object to the question, your Honor, and move to strike the answer out on the grounds that it has no bearing at all upon the measure of damage whether it was sold prior to or after the arrival of the cargo.

The COURT.—Objection overruled and motion to strike out the answer is denied.

Mr. FLEMING.—Save an exception. I ask, your Honor, that the same objection, ruling and exception may [115] go to all questions of this character.

The COURT.—Yes, sir.

The COURT.—Q. Your answer was that you had sold seventy-five thousand sacks of this flour before the arrival of the cargo at Chefoo? A. Yes, sir.

Mr. FESSENDEN.—Q. At about what price had you sold it?

A. At 4.25 per four sacks at the exchange of 58 making $1.83\frac{1}{5}$ taels per sack.

Mr. FLEMING.—Q. Is this covered by a written contract, this sale?

Mr. FESSENDEN.—A. We will come to that a little later on.

Mr. FESSENDEN.—Q. To whom was this cargo sold?

A. To four Chinese merchants. Seventy thousand bags to three Chinese flour merchants and five

(Testimony of A. Graeber.)

thousand bags to our compradore.

Q. Now, did the Chinese to whom this flour was sold take delivery of the flour?

A. No, sir; they refused to take delivery.

Q. Did they give any reason for refusing to take delivery of the flour after its arrival at Chefoo?

A. Yes, sir; on account of late shipment and late arrival.

Q. Referring to those contracts you had with the Chinese for the sale of flour—did you have written contracts with these Chinese?

A. Yes, sir; for the seventy thousand bags but not for the last five thousand bags.

Q. Those contracts are written in Chinese, are they not? A. Yes, sir.

Q. Will you please produce those contracts?

(Witness produces the contracts.) [116]

Q. Have you English translations attached to these contracts?

A. Yes, sir; here they are (showing).

Mr. FLEMING.—If your Honor please, I now move to strike out all of the evidence of this witness as to the terms of this contract on the grounds that it now appears that he produces the contract which is the best evidence of the terms of the contract.

The COURT.—Are you going to put the contract itself in evidence, Mr. Fessenden?

Mr. FESSENDEN.—Yes, your Honor. I simply asked these questions of this witness as preliminary to offering the contract itself in evidence.

The COURT.—Yes; but he went on and answered

(Testimony of A. Graeber.)

as to the terms of the contract.

Mr. FESSENDEN.—This, your Honor, is the contract for the seventy thousand sacks of flour—that is correct, is it not, Mr. Graeber?

A. Yes, sir.

Mr. FESSENDEN.—Q. And this is what (showing witness paper) ?

A. The English translation of the contract.

Q. Are the terms of the contract written in Chinese correctly stated in the English translation thereof? A. Yes, sir; they are.

Mr. FLEMING.—Q. Is the contract itself written in Chinese? A. Yes, sir.

Mr. FESSENDEN.—From my point of view the terms of this contract are not important in deciding this case. The fact that he had resold the cargo of flour is sufficient from our point of view, but I put this contract in to show that the cargo of flour had [117] been resold.

Mr. FLEMING.—We do not know what that contract is by reason of its being written in Chinese. I think a perfect translation of it in English should also be offered with it.

Mr. FESSENDEN.—The translation in English is offered with it.

Mr. FLEMING.—I am not in a position, your Honor, to object to this contract and the translation thereof at the present time as I do not know how correctly the translation has been made.

The COURT.—It has not been offered in evidence yet.

(Testimony of A. Graeber.)

Mr. FESSENDEN.—If your Honor please, I now offer this contract for seventy thousand bags of flour written in the Chinese language together with a translation thereof in evidence and ask to have it marked as an exhibit.

Mr. FLEMING.—I object to it, your Honor, on the grounds that the contract has not been proven and there is no proof of the translation and no one knows what its terms are and for those reasons it is incompetent as evidence in this case. The translation may or may not be correct.

The COURT.—Q. Mr. Graeber, are you familiar with the Chinese language?

A. No, sir. It was made through our compradore.

Q. All you know concerning the truth of your statements in regard to the terms of this contract is through your compradore?

A. Yes, sir. I had it translated at the American Consulate but I have not got that translation.

The COURT.—I think you will have to prove its contents in the usual way and you will have to have it translated. [118] One way would be to have an interpreter sworn and let him translate it.

OU YANG KONG sworn as Chinese Interpreter.

The COURT.—Please translate this Chinese into English, Mr. Kong.

Mr. KONG translates as follows: This agreement entered into between Mr. Li Cheng Tai and H. Diederichsen and Company of seventy thousand sacks of American flour of Morjon mark of which thirty thousand sacks are for Li Cheng Tai, twenty

(Testimony of A. Graeber.)

thousand sacks are for Tsung Sheng Yi and twenty thousand sacks are for Yung Ho Chang. It is agreed that the cargo shall be delivered at Chefoo on board the steamer in or about the 3d Moon in the year 1912. The quality of the cargo shall be in accordance with the sample furnished to the two shops above named and the quantity per sack shall be the same as Dayton chop. The price is hereby agreed upon to be Shanghai Taels 1.83 per sack, payable upon delivery of the cargo by Native Orders on Shanghai. If the cargo shall not arrive in due time or quality be not in accordance with the sample the buyer shall have the liberty to cancel the contract. As verbal evidence is not sufficient this is written for evidence. Dated the first day of the 9th Moon 3rd Year of Sheu Tung. Chopped by Li Cheng Tai Company of Chefoo and Lee Shing Tie Kee. The other chop marks indicate the number of sacks.

Mr. FESSENDEN.—Now, you have heard the translation of the contract, Mr. Fleming, and I ask you if you have any objections to make now to the contract and translation.

Mr. FLEMING.—Yes; I have the further objection to make [119] that the execution of the contract is not proved.

Mr. FESSENDEN.—We can't bring all these witnesses from Chefoo. Mr. Graeber testifies that this is the contract and that this is a correct translation of it. At least he has testified that this is the contract.

(Testimony of A. Graeber.)

Mr. FLEMING.—That don't prove the contract by any means.

The COURT.—Q. Mr. Graeber, as a matter of fact what do you know about this contract as having been made and delivered to you as the contract entered into between these Chinese flour buyers and your firm—this you understand to be the contract referred to?

A. Yes, sir; there were two made out at the time.

Q. What do you know individually or personally about this paper, purported contract—did you keep it yourself?

A. Yes, sir; it was delivered to me and I kept it in my safe.

Q. Who was it delivered to you by?

A. Through the compradore's office.

Q. Are you familiar with this Chinese chop on the contract?

A. No, sir; but I can vouch that it is the original contract as I kept it in my safe from the time of its delivery to me.

Mr. FESSENDEN.—I have the compradore of Diederichsen & Company of Chefoo here, your Honor.

The COURT.—I think you had better furnish further proofs on this contract in the essential points. The objection will be sustained for the present.

Mr. FLEMING.—And all of the evidence pertaining to this contract will be stricken from the record, [120] your Honor?

The COURT.—It will be on the whole of the evi-

(Testimony of A. Graeber.)

dence submitted as to whether the Court will admit this contract in evidence. All this testimony is tentatively in the record subject to your objection and the contract is offered and refused.

Mr. FESSENDEN.—Q. Mr. Graeber, when you found out that the Chinese buyers declined to take this cargo what did you do?

A. I put it at the disposal of Connell Brothers & Company.

Q. You left it at the disposal of Connell Brothers & Company? A. Yes, sir.

Q. I mean after that what action did you take—you testified that you received no reply to that telegram you sent to Shanghai to Connell Brothers & Company?

A. We discharged the cargo and put it in the go-downs of the Russo-Asiatic Bank and two other go-downs.

Mr. FLEMING.—We object, your Honor, on the grounds that the questions are irrelevant, incompetent, immaterial and in no way tend to establish the measure of damage in this case, and I move to strike the answers out.

The COURT.—Objection overruled and motion denied.

Mr. FLEMING.—Save an exception. I ask, your Honor, that this objection, ruling and exception may apply to any further testimony given on that line by this witness.

The COURT.—I do not want to make such a ruling, Mr. Fleming, as it is too broad and far-reaching

(Testimony of A. Graeber.)

as it appears to the Court at the present time this may be very material evidence. You might later on [121] move to strike the testimony of this witness on this point if you thought well of it.

Mr. FESSENDEN.—Q. Now, Mr. Graeber, after storing the cargo in the go-downs what did you do?

Mr. FLEMING.—We object to that, your Honor, on the grounds it is incompetent, irrelevant, immaterial and tends in no way to establish the measure of damage in this case.

The COURT.—Objection overruled.

Mr. FLEMING.—Save an exception.

A. We received no instructions from Connell Brothers and Company as to the sale of the flour and so we made inquiries as to the market. I sold part of the cargo in order not to lose too much. We were afraid the market would go down.

Mr. FESSENDEN.—Q. You say you sold part of the cargo?

A. Yes, sir.

Q. How much did you sell?

The COURT.—Mr. Fleming, I am willing to allow your objection to run to this particular line of testimony as to what the plaintiff did in disposing of the flour. You object to all that class of testimony?

Mr. FLEMING.—Yes, your Honor.

The COURT.—The Court overrules your objection and you may take your exception.

Mr. FLEMING.—Save an exception.

(Question read.)

A. The first sale was five thousand sacks.

(Testimony of A. Graeber.)

Mr. FESSENDEN.—Q. You sold five thousand sacks?

A. Yes, sir; at 1.58—one Chefoo tael and 58 candarines less 2 per cent.

Q. Next sale was for what?

A. I think then we sold something like six thousand [122] sacks at 1.57.

Q. You have a list of your sales?

A. Yes, sir. (Referring to list.) Six thousand sacks at 1.57 minus 2 per cent.

Q. That is the second sale?

A. Yes, sir; they were not delivered all at once but were delivered in small lots.

Q. That is six thousand sacks?

A. Yes, sir; five thousand at 1.56 less 2 per cent; forty-seven hundred sacks at 1.55 less 2 per cent; nineteen thousand three hundred sacks at 1.54 less 2 per cent; nineteen thousand five hundred at 1.45 less 2 per cent; twenty thousand five hundred sacks at 1.42 less 2 per cent.

Q. Those figures represent the aggregate of sales at the various prices obtained?

A. The cargo was sold in much smaller lots and I settled with the compradore at these prices and he gave me a detailed statement of every expense occurring in the transactions, storage and everything and a detailed list of sales were given here. (Referring to paper witness has been reading from.)

Q. Who made this list?

A. This is made by the compradore.

Q. This is the compradore list?

(Testimony of A. Graeber.)

A. Yes, sir; and covers eighty thousand sacks of flour.

Q. What was the total amount realized on the sale of the eighty thousand sacks of flour?

A. One hundred seventeen thousand one hundred twenty-one and seventy-six one hundred Chefoo taels.

Q. And the total cost of the flour according to the contract price at exchange 56 was how much?

A. Something like one hundred and forty thousand taels. [123] I don't remember exactly. One hundred forty thousand nine hundred twenty-three and naught eight Chefoo taels.

A. I understood you to say, Mr. Graeber, that you sold this cargo of flour prior to the arrival of the steamer for the sum of one hundred forty thousand nine hundred twenty-three and naught eight Chefoo taels?

A. With the exception of five thousand sacks.

Q. You put the whole thing in here (referring to list)?

A. Yes, sir. He had put the whole thing in as if it was eighty thousand sacks.

Q. You had sold, I understood you to say, prior to the arrival of the "Harpagus" with the cargo of flour seventy-five thousand sacks? A. Yes, sir.

Q. For one hundred forty thousand nine hundred twenty-three naught eight Chefoo taels?

A. Yes, sir.

Q. And you subsequently disposed of the total eighty thousand *sacks for*?

(Testimony of A. Graeber.)

A. One hundred seventeen thousand one hundred twenty-one and seventy-sixth hundreds Chefoo taels.

Q. Now, Mr. Graeber, in making those sales of flour in Chefoo, what first, if anything, did you do—did you make sale at the best market price?

A. We had our market-man in constant touch with the flour market of Chefoo and we received from the middle of May to June almost daily reports about the Shanghai flour market from our Shanghai firm.

Q. You were keeping in touch with the situation of the flour markets of Chefoo and Shanghai?

A. Yes, sir. We had a man doing practically nothing [124] else but making inquiries and keeping in touch with the flour market and situation in Chefoo, and when, in our opinion, we thought flour would still go further down we would sell more and more of it.

Q. You had a special man for this business in your employ?

A. No, sir; not specially for this business. He was doing other things besides but he was going daily to the market and reporting to us daily concerning the market for flour and the flour prices in Chefoo and I would act according to these reports. I made up my mind not to lose any more on this flour than I could possibly help, and so I commenced to sell in smaller lots so as not to depress the market too much.

Q. Did you keep informed as to the importation of flour into Chefoo and the immediate surrounding country?

(Testimony of A. Graeber.)

A. Yes, sir; we had our market-man also reporting on that and it was found out that the declining of the market was due to the importation of flour. After we had sold out entirely the market declined still further owing to the importation of flour into Chefoo.

Q. Now, you say you kept in touch with the Shanghai flour market as well as the Chefoo flour market?

A. Yes, sir, we received almost daily reports about the Shanghai flour market from our Shanghai firm. We also received flour market reports, a few only, however, from Shanghai from Connell Brothers & Company's Shanghai office, which were contradicted by the market reports of our firm in Shanghai.

Mr. FLEMING.—If your Honor please, I move to strike that answer out as it is not shown that the firm [125] of H. Diederichsen & Company of Shanghai are flour experts or largely engaged in the flour business in this or the Chefoo market.

Mr. FESSENDEN.—I am not putting this evidence in, your Honor, to establish or show the truth of the statements regarding the market prices received from his own firm or Connell Brothers & Company in Shanghai, but to show that he did keep in touch with the market prices whether true or not I do not know. At this date it is almost impossible to prove the market prices of flour prevailing in Shanghai, whether it was exactly right at that date or not, but I am putting in this evidence to show that he did take pains to keep in touch with the market prices of flour at Shanghai at that time.

(Testimony of A. Graeber.)

The COURT.—Objection overruled and motion to strike out the answer of the witness denied.

Mr. FLEMING.—Save an exception.

Mr. FESSENDEN.—Q. Mr. Graeber, did you make any attempt to induce the Chinese flour buyers to whom you had actually sold this flour before the arrival of the cargo of flour to accept delivery of it?

A. Yes, sir; through the American Consul in Chefoo.

Q. Through the American Consul—what do you mean by that?

A. We took proceedings at the Chinese courts through our consul, through the American Consul.

The COURT.—Q. Seeking to enforce the Chinese buyers to take delivery of the cargo?

A. Yes, sir.

Mr. FESSENDEN.—Q. Did you make a success of that?

A. No, sir; we tried but found it was impossible.

Q. Now, Mr. Graeber, you have been in business a good many years in Chefoo? [126]

A. Yes, sir.

Q. Are there other foreign firms besides your own who import cargo to any extent in Chefoo?

A. Flour, you mean?

Q. Yes, sir.

A. Not in the last four or five years; not that I remember.

Q. Are there Chinese flour importers?

A. Yes, sir; but from Shanghai and Hongkong only, not from America in the last few years.

(Testimony of A. Graeber.)

Q. From Shanghai and Hongkong only?

A. Yes, sir.

Q. Were these flour sales you have just mentioned made in competition with those Chinese Hongs that were selling flour at the same time? A. Yes, sir.

Q. You had to meet them as flour competitors?

A. Yes, sir. They were Chinese flour buyers and importers—not of the same brand though.

Q. This flour was of a brand known as “Morjon”?

A. Yes, sir; “Morjon.”

Q. Was that brand well-known in the Chefoo flour market? A. No, sir; it was not known at all.

Q. Would the fact that a brand of flour not being known have any effect upon the price you would get for it in that market?

A. Yes, sir; the price is consequently lower on an unknown brand.

Q. I notice on this sheet giving sales of flour that there is a decline in prices received, a steady decline, from the first sales to the last, that is, the prices received on the first sales was higher than the following one, they keep running down [127] lower; can you explain that?

A. Yes, sir. About some time in June we got information from our Shanghai people that the prospects of the flour market seemed to be better so we stopped selling flour and I was also told by our comprador and a flour market-man in Chefoo that they expected the price to go up.

Mr. FLEMING.—We object, your Honor, on the grounds that this is entirely hearsay evidence and not

(Testimony of A. Graeber.)

proven the parties giving it were in a position to know the state of the flour market.

The COURT.—Objection overruled.

Mr. FLEMING.—Save an exception.

Mr. FESSENDEN.—I want to show, your Honor, generally the steps taken by H. Diederichsen & Company to sell this cargo of flour at the best prices they could obtain for it.

Mr. FESSENDEN.—Q. It is a fact, is it not, Mr. Graeber, with the single exception of your firm the flour trade in Chefoo is in the hands of Chinese?

A. Yes, sir.

Q. Have you ever seen any market reports or trade reports on flour issued in Chefoo?

A. No, sir; never seen any.

Q. To the best of your knowledge is there any such thing in Chefoo? A. No, sir.

Q. As a trade report or a market report?

A. No, sir. No; they have none.

Q. Now, Mr. Graeber, did you incur certain other expenses in connection with the sale of this flour?

A. Yes, sir; storage.

Mr. FLEMING.—We object, your Honor, on the grounds [128] that the evidence is irrelevant, immaterial and incompetent and has nothing to do with the proof of damages, and we object to it on the further grounds that if they can maintain their claim for damages they would only be entitled to the difference in price which they claim they sold at and the price at which they did actually sell at, and then they would be getting all the profits out if they could

(Testimony of A. Graeber.)

possibly expect to get and they would have to meet these expenses.

Mr. FESSENDEN.—Our position is, your Honor, we are entitled to what we have been out of pocket and the profits we would have made also.

The COURT.—Objection overruled. The Court will allow this witness to testify to the expenses incurred, the actual expenses incurred by plaintiff in connection with the handling of this cargo of flour.

Mr. FLEMING.—Save an exception.

Mr. FESSENDEN.—Q. The first on the bill of particulars is an item of interest—just what does that represent, Mr. Graeber?

A. Interest paid to the Russo-Chinese Bank from date of shipment up to the date of delivery of the cargo, date of sale of the cargo according to the notes attached.

Q. It is interest paid the Russo-Asiatic Bank on the draft?

A. Yes, sir; from the date of shipment to the retirement of the draft.

Mr. FLEMING.—My objection and exception, your Honor, goes to this entire line of class of testimony.

The COURT.—That is correct according to my statement.

Mr. FLEMING.—Save an exception. [129]

Mr. FESSENDEN.—Q. Here are some bills from the Russo-Asiatic Bank through whom those drafts were drawn—these are their bills receipted by the bank?

(Testimony of A. Graeber.)

A. Yes, sir.

Mr. FESSENDEN.—Mr. Fleming, do you object to these bills going in evidence?

Mr. FLEMING.—Only as coming under the general objection.

The COURT.—These are the interest items charged by the Russo-Asiatic Bank on account of this purchase of money which was paid in Tacoma through this bank ultimately?

A. In settlement; yes, sir. The credit was arranged in Tacoma but the interest amounts were paid into the Russo-Asiatic Bank in Shanghai, the draft carrying interest.

Mr. FESSENDEN.—Q. These are bills presented by the Russo-Asiatic Bank to you for interest?

A. Yes, sir.

Q. Do you know what this refers to (showing witness)?

A. Storage and interest paid; storage and interest paid the Russo-Asiatic Bank.

Q. On this flour?

A. Yes, sir; and here (showing) is given the amount of the draft.

Q. And these are bills submitted to you by the Russo-Asiatic Bank?

A. Yes, sir; retirement and interest on this draft of eighty-three thousand dollars gold.

Q. And these aggregate how much?

A. Three thousand six hundred twenty-six dollars and thirty-six cents.

Mr. FESSENDEN.—I offer them in evidence and

(Testimony of A. Graeber.)

ask to have them marked as plaintiff's exhibit.
[130]

(Marked and filed Plaintiff's Exhibit "E.")

Mr. FESSENDEN.—Q. You paid a certain amount of storage for this flour according to the bill of particulars? A. Yes, sir.

Q. How did you come to incur storage on this flour?

A. Stored the cargo at the Russo-Asiatic go-down and also in a go-down with L. Smith & Company. There are the bills.

Q. You stored the cargo of flour in the Russo-Asiatic go-down and the L. A. Smith & Company go-down? A. Yes, sir.

Q. And these are the bills rendered to you by the L. A. Smith Company for go-down charges on this flour which you had stored in their go-downs?

A. Yes, sir; and these bills were paid through our compradore department.

Q. And for a portion of the eighty thousand sacks of flour shipped to your firm through Connell Brothers & Company? A. Yes, sir.

Q. Interest and go-down charges due the Russo-Asiatic Bank was rendered you on the same sheets of paper and in the same accounts? A. Yes, sir.

Q. And these bills rendered you for go-down storage from L. A. Smith & Company together with the storage account from the Russo-Asiatic Bank on this flour amounted to the sum of five hundred ninety-two and seventy-eight hundreds dollars?

A. Yes, sir; five hundred ninety-two dollars and

(Testimony of A. Graeber.)

seventy-six cents paid for storage.

Mr. FESSENDEN.—We offer these accounts rendered the plaintiff, H. Diederichsen & Company, by L. A. [131] Smith & Company for go-down rent or storage in evidence and ask to have them marked as plaintiff's exhibit in the case.

The COURT.—They will be received subject to the objection heretofore made by Mr. Fleming to this line of testimony.

Mr. FLEMING.—Save an exception.

(Marked and filed Plaintiff's Exhibit "F.")

Mr. FESSENDEN.—Q. Mr. Graeber, I see you have an item here for lighterage? A. Yes, sir.

Q. That lightering was done by your own firm?

A. Yes, sir.

Q. And is that the usual charge for lightering such cargo?

A. Yes, sir; the usual charge—two cents per bag.

Q. Your firm does this lightering business at Chefoo?

A. Yes, sir; as agents of the Hamburg-American line.

Q. That item is one thousand six hundred dollars for lightering eighty thousand sacks of flour?

A. Yes, sir.

Q. Coolie hire charge eight hundred dollars for landing flour?

A. Yes, sir; it was done by our own coolies. It is the usual charge of one cent per sack.

Q. It was done by your own coolies?

A. Yes, sir.

(Testimony of A. Graeber.)

Q. Then you have a charge here for matting used for storing purposes?

A. Yes, sir; that was matting used in the two go-downs in properly storing and caring for this cargo of flour. Eighty-five dollars and eighty cents.

Q. That matting was a necessary thing to use in the storing of this flour? [132]

A. It was in this case.

Q. And the firm of H. Diedrichsen & Company paid that sum of eighty-five dollars and eighty cents?

A. Yes, sir; they did.

Q. You have an item here of seventy dollars and forty cents for a consular protest?

A. Yes, sir. I filed a protest against the payment of the draft from the Russo-Asiatic Bank; filed a protest at the American Consulate in Chefoo against payment of the draft.

Q. And was that amount paid by your company in connection with the filing of the protest before the American Consul at Chefoo? A. Yes, sir.

Mr. FESSENDEN.—That protest has already been offered in evidence, your Honor, and is marked Plaintiff's Exhibit "D." The last item in the bill of particulars "as per enclosed letter gold three hundred and fifty dollars"—what does that item refer to?

A. That was to cover the interest from America to Chefoo.

Q. These different items of charges you have just testified to concerning storage, lighterage, coolie hire, matting and so forth—were they necessary in the

(Testimony of A. Graeber.)

handling and care of this cargo of flour?

A. Yes, sir; absolutely; the 5,000 sacks is stricken from there.

Q. You sold seventy-five thousand sacks of this cargo of eighty thousand sacks you stated I believe?

A. Yes, sir. The last five thousand sacks were disposed of.

Q. Those were subsequently sold? A. Yes, sir.

Q. You mean by that you bought five thousand sacks? [133]

A. Yes, sir. Seventy-five thousand only were sold and we have to leave the five thousand sacks off there. We think we have to bear the expenses ourselves.

Q. There is no profit figured on that?

A. But the expenses would come before or to our firm but not the seventy-five thousand. The storage, lighterage, coolie hire and interest would be paid by the buyers.

Q. The charges are for five thousand sacks more than they ought to be? A. Yes, sir.

Q. Can you separate it?

A. Yes, sir; I can easily.

Q. I think these only cover the seventy-five thousand sacks? A. No; eighty thousand.

Q. You settled with the bank with reference to that draft for eighty-three thousand gold dollars at a certain rate of exchange agreed to between you?

A. Yes, sir; at 58. I have the contract here (showing).

Mr. FESSENDEN.—Mr. Fleming, do you object

(Testimony of A. Graeber.)

to this paper from the Russo-Asiatic Bank being offered in evidence of the exchange settlement against the draft?

Mr. FLEMING.—We will object to it, your Honor, on the grounds that it is incompetent, irrelevant, immaterial and simply represents a speculation in exchange by the plaintiff in this case.

The COURT.—Objection is overruled.

Mr. FLEMING.—Save an exception.

(Marked and filed as Plaintiff's Exhibit "G.")

Mr. FESSENDEN.—Q. Can you explain why you did settle exchange against that draft?

A. Yes, sir. [134]

Q. Was it necessary to settle exchange in this deal?

A. Yes, sir. We had to guarantee to the Chinese 1.83 and something per sack in order to get their business as they were not willing to gamble on the exchange.

Q. The draft drawn by Connell Brothers & Company on you was in gold? A. Yes, sir.

Q. And you settled with your bankers for this eighty-three thousand dollars gold in taels at a fixed rate of exchange of 58 against that draft?

A. Yes, sir.

Q. If you did not settle on the rate of exchange how would your draft be retired?

A. At the rate of exchange of the day. It was better in this case as exchange went up.

Q. Your draft would be retired on the rate of ex-

(Testimony of A. Graeber.)

change prevailing on the day it fell due?

A. Yes, sir.

Q. And which might make a very material difference? A. Yes, sir.

Q. It would be a gamble in that case?

A. Yes, sir.

The COURT.—I am satisfied with the statement offered in evidence and admitted as representing the exchange upon which the draft was actually retired, but as to why the witness procured the contract from the bank on rate of exchange to be used in settlement of the draft I don't think amounts to anything in the settlement of the issue now involved in this case.

Mr. FLEMING.—Then, your Honor, that particular testimony will be stricken out. [135]

The COURT.—Yes, sir. Strike out the testimony with reference to this paper and why the exchange was fixed on October 17th, 1911, and all testimony pertaining to it. The paper is admitted with the statement of the witness that the paper or contract he made with the Russo-Asiatic Bank required him to make settlement and retire his draft in accordance with the rate of exchange fixed therein.

Mr. FESSENDEN.—Q. The exchange was settled and fixed between you and the bank on the same day the order for the flour was signed, was it not?

A. Yes, sir.

Q. Now, Mr. Graeber, between the date this order was given to Connel Brothers and Company for the flour and the date the steamship "Harpagus" arrived in Chefoo with the cargo of flour was there

(Testimony of A. Graeber.)

any difference between the market condition in Chefoo in regard to prices of flour?

A. Yes, sir; prices of flour declined.

Q. Was the decline much of a decline, a material decline?

A. It was a decline of something like twenty or twenty-two candareens per bag.

Q. Twenty or twenty-two candareens decline per sack?

A. Yes, sir; per sack. That is between our contract price and the market price.

Q. Did the flour market of Chefoo with regard to the price of flour recover—did the market price go back to the same places they were prior to that decline? A. You mean now?

Q. I mean since that time?

A. Up to the end of last year the prices still declined further, but from then there was a slight upward tendency. [136]

Q. A slight upward tendency? A. Yes, sir.

Mr. FESSENDEN.—Take the witness.

June 20th, 1913, 9 o'clock A. M.

A. GRAEBER, continuing.

Cross-examination.

(By Mr. FLEMING.)

Mr. FLEMING.—If your Honor please, I ask that my last question be withdrawn and that all the questions asked and answers thereto of this witness on cross-examination so far be stricken from the record.

The COURT.—Your motion will be granted.

(Testimony of A. Graeber.)

Mr. FLEMING.—Q. Mr. Graeber, now you say you settled exchange with the Russo-Asiatic Bank at the date you placed this order for eighty thousand sacks of flour with Connell Brothers & Company?

A. Yes, sir.

Q. Now, if you had not settled exchange on that date, but had waited until the cargo of flour had arrived from America in Chefoo the cost to you in taels, local currency, of this shipment of flour worth eighty-three thousand dollars gold would have been very much less? A. Yes, sir.

Q. Early in the year 1912 the price of silver went up, did it not? A. Yes, sir.

Q. And so instead of getting only fifty-eight gold cents for one tael you would have been able to have purchased from sixty-four to seventy gold cents, would you not, if you had not settled exchange when you did? [137]

A. I think it was something like sixty-three. I am not quite sure.

Q. You think it was something like sixty-three in March? A. I think it was; yes, sir.

Q. And from that time on it advanced, didn't it in 1912?

A. I cannot say when the exchange was the highest.

Q. At any rate the price of silver was very much higher than it was when you settled this exchange?

A. Yes, sir.

Q. You are at liberty to fix the exchange at the time you make your contracts?

(Testimony of A. Graeber.)

A. No; we have to guarantee the Chinese the amount in taels and in order to be able to do it we have to fix the exchange at the date I place the contract.

Q. In their contracts you had to guarantee the price in taels?

A. The Chinese contract says one tael eighty-three in Shanghai taels. The Chinese contractors draw on Shanghai in payment of their cargo.

Q. But you are at liberty to settle that exchange if you wished at the time the ship arrived with the cargo—it was simply a matter of judgment with you at the time? A. Yes, sir.

Q. And instead of settling it at fifty-eight the 17th of October, 1911, if you had waited until the cargo arrived it would have cost you very much less in taels than it did? A. Yes, sir.

Q. In fact, the difference would have amounted to about practically the loss you now claim?

A. Not quite.

Q. Well, the greater proportion of it? [138]

A. I do not know the proportion, but not altogether.

Q. Now, you say the price of flour declined in taels? A. In taels; yes, sir.

Q. And had declined at the time this ship “Harpagus” or shipment of flour had arrived in Chefoo?

A. Yes, sir.

Q. Now, Mr. Graeber, I will ask you if it is not true that in the latter part of the year 1911 the largest Chinese bank in Chefoo known as the Seng Tai

(Testimony of A. Graeber.)

Bank did not fail and go into bankruptcy?

Mr. FESSENDEN.—We object, your Honor. What has that got to do with the issues involved in this case?

Mr. FLEMING.—I want to show the cause, the reason, why these Chinese flour buyers dealing with H. Diederichsen and Company in relation to this cargo of flour could not take delivery of their cargo under the contracts.

The COURT.—I don't see that that has anything to do with the issues here presented.

Mr. FLEMING.—I will state the purpose, your Honor. I offered to prove that in the latter part of 1911, long prior to the time the cargo was due to arrive in Chefoo the Chinese bank known as the Seng Tai Bank, which was the financial agent of the Chinese merchants in Chefoo, failed—

The COURT.—You state that as a fact, Mr. Fleming?

Mr. FLEMING.—I can prove it by this witness, I think, your Honor. That the failure of this bank brought into bankruptcy a large number of the clients of the bank, among whom were the Chinese flour buyers whom this witness had heretofore mentioned in his testimony.

The COURT.—I will admit the testimony subject to the objection of counsel for plaintiff and later on if [139] not connected up counsel for plaintiff can move to have it stricken out.

(Question read.)

Mr. FLEMING.—The Seng Tai Bank in Chefoo,

(Testimony of A. Graeber.)

the largest bank operating there?

A. Not by any means.

Q. What was the largest bank in Chefoo?

A. In my opinion the Ken Ah-fing Bank.

Q. You knew the Seng Tai Bank? A. Yes, sir.

Q. I will ask you if that bank did not fail during the latter part of the year 1911? A. Did it fail?

Q. Yes, sir. A. Yes, sir; it did fail.

Q. I will ask you if that was not the bank in which the largest number of Chinese merchants doing business with foreigners in Chefoo had their accounts?

A. I cannot say.

Q. I will ask you this question, Mr. Graeber. You say the Chinese buyers who you mentioned in your testimony, that you sued them? A. Yes, sir.

Q. I will ask you if it is not a fact that they were sued by your compradore?

A. No, sir; they were not.

Q. Where were they sued?

A. A Chinese court or the Chinese Foreign Office they call it.

Q. And I will ask you, Mr. Graeber, if each and every one of those Chinese merchants were not insolvent at the time you brought suit?

A. Yes, sir; one of them was nearly insolvent.

Q. And the other two were insolvent? [140]

A. I beg your pardon. One was and the other was not.

Q. Which one was insolvent?

A. The man who had bought thirty thousand sacks of flour from us—Lee Sing Iti.

(Testimony of A. Graeber.)

Q. And isn't the reason why you could not accomplish anything by your suit was because the Chinese against whom you brought this suit had no funds with which to pay; that they were hopelessly bankrupt?

A. Oh, no; that is not so.

Q. This difference in exchange, the increase in the price of silver, affected the price of foreign goods in China, did it, very materially? A. Yes, sir; it did.

Q. So that according to your statement this flour at exchange fifty-eight would be worth taels one eighty-three? A. Yes, sir.

Q. It was worth considerably less in the spring, in March, April or May, 1912? A. Yes, sir.

Q. With exchange at sixty-three or over?

A. Yes, sir.

Q. Now, at the time this cargo of flour arrived at Chefoo, I will ask you if it is not a fact that the market price of flour in gold was greater?

A. It was according to exchange.

Q. And it was greater than what you paid for it under your contract with Connell Brothers & Company?

A. It is so according to Connell Brothers & Company's market report. I cannot vouch for that.

Q. The market price of this flour in gold in Chefoo increased or became greater by reason of exchange?

A. Yes, sir; according to Connell Brothers & Company's report. [141]

Q. Now, Mr. Graeber, I will ask you if it is not a fact that the price of this flour in taels, cost price,

(Testimony of A. Graeber.)

the market price of this flour in taels, declined with the rise in the price of silver?

A. I cannot say whether it was entirely due to that. The fact was that the price of flour declined during the spring of 1912.

Q. You deny that that was not the cause, that the price of flour declined with the rise in the price of silver—you deny that that decline was not increased with the rise in the price of silver?

A. I cannot say that it was entirely due to that.

Q. I will ask you if that is not the fact with prices of foreign goods generally when bought on a gold basis? A. Yes, sir.

Q. That the local price in silver currency will decline with the rise in the price of silver or increase with the decline in the price of silver?

A. Yes, sir; nothing else hardly upsets it.

Q. I will ask you if it is not a fact that the Chinese Revolution broke out here in the autumn of 1911?

A. Yes, sir.

Mr. FESSENDEN.—I take it, your Honor, that all this line of testimony is coming in under our objection.

The COURT.—You must make this witness your own witness, Mr. Fleming, if you are going to go into questions of this character.

Mr. FLEMING.—I will withdraw the question about the Revolution.

Mr. FLEMING.—Q. Now, Mr. Graeber, can you give me the dates upon which you sold or marketed this flour—you gave the different quantities you sold

(Testimony of A. Graeber.)

or marketed, [142] but you did not give the specific dates. The first sale you made was of five thousand sacks at 1.58 less 2%. Can you give me the date of that sale, Mr. Graeber?

A. Some time in May, the latter part of May, about the 24th of May.

Q. 1912, of course? A. Yes, sir.

Q. When did you make the next sale of six thousand sacks? A. Three or four days later.

Q. And the third sale of five thousand sacks at 1.56?

A. Some time in June, I think. I am not sure as to the exact date.

Q. The fourth sale of four thousand seven hundred sacks at 1.55?

A. I am not quite sure as to the dates.

Q. Have you a memorandum or book showing these different sales?

A. As we retire the draft on sales of the flour the bank receipts to us which receipts we have here.

Q. When was the sale of four thousand seven hundred sacks made?

A. I am not quite sure as to the date.

Q. Approximately will do, Mr. Graeber.

A. It must have been some time in June.

Q. And the nineteen thousand three hundred sacks?

A. I am also not quite sure of that date.

Q. Approximately. A. I cannot say.

Mr. FLEMING.—I have no objection to Mr. Graeber looking at the receipts or stubs showing the

(Testimony of A. Graeber.)

date of these sales.

A. Here (showing paper) are the different retirements [143] of the draft from the bank. Some time in June.

Mr. FLEMING.—Q. The nineteen thousand five hundred at 1.45?

A. That was a sale made in June, I am pretty sure.

Q. There is only one more item—twenty thousand five hundred sacks?

A. The end of September. Nineteen thousand and five hundred sacks some time in September.

Q. And the twenty thousand five hundred sacks, the last one?

A. That is the end of September to the beginning of October.

Q. These were in 1912, all these sales?

A. Yes, sir.

Q. Now, I will ask you, Mr. Graeber, if this was not the first shipment of foreign flour that you had handled at Chefoo? A. Me personally?

Q. Your firm?

A. I think my predecessor handled shipments of foreign flour.

Q. How long have you been manager of H. Diederichsen & Company at Chefoo?

A. Eight years. I beg your pardon. With the exception of five thousand sacks we handled once.

Q. What time was that?

A. That was in 1906 or 7.

Q. And you are not really in the flour business there in Chefoo? A. No, sir; I admit that.

(Testimony of A. Graeber.)

Q. I will ask you if it is not a fact that “Morjon” flour is the best known brand of flour in the market at Chefoo? [144]

A. The brand of “Morjon” flour is not known in Chefoo. As to the quality, I think it is the best.

Q. Is not “Morjon” flour a brand that it is better known in Chefoo than any other foreign brand of flour there? A. No, sir; by no means.

Q. Is it not a fact that this brand of “Morjon” flour is the best known brand of foreign flour on the Chefoo market? A. No, sir; it is not.

Q. I will ask you, Mr. Graeber, if it is not a fact that this “Morjon” brand of flour has a better sale and more sales are made of this brand of flour than is made of any other foreign flour in Chefoo and in China generally? A. I cannot say.

Mr. FESSENDEN.—I object to asking the witness about flour generally all over China.

The COURT.—I think you had better confine yourself to the market of Chefoo, Mr. Fleming. The question is, Mr. Graeber, as to whether this is the best-known brand of foreign flour on the Chefoo market, this “Morjon” brand?

A. Not in Chefoo; no, sir.

Q. Do you know as to Chefoo?

A. Yes, sir; I do know as to Chefoo.

Mr. FLEMING.—Q. I will ask you, Mr. Graeber, if it is not a fact that this “Morjon” brand of flour has by far the largest sales of any flour from a foreign country sold in Chefoo?

A. No, sir; it is not a fact.

(Testimony of A. Graeber.)

Q. I will ask you, Mr. Graeber, if it is not a fact that by far the largest quantity of flour used in Chefoo comes from Shanghai?

A. It all depends on the American market whether the [145] price can compare with the Shanghai and Hongkong mills.

Q. Take both the foreign and the Chinese flour and it is a fact that by far the largest amount of it is imported from Shanghai and Hongkong?

A. Some years yes and some years not.

Q. Where else does flour come from except from Shanghai and Honkong except by direct shipments from America?

A. There have been many direct shipments from other places.

Q. During the year 1912 I will ask you if this shipment of flour from America consigned to you was not the only direct shipment of flour made from America to Chefoo? A. Yes, sir.

Q. There was none other made to Chefoo during 1912?

A. No, sir; not from America that I know of.

Q. And the flour market at Chefoo was supplied entirely by direct shipments from Shanghai and Hongkong and the shipment made direct to you from America? A. Yes, sir.

Mr. FLEMING.—That is all.

Redirect Examination.

Mr. FESSENDEN.—Q. Mr. Graeber, if you had not settled exchange when you did and the exchange had dropped instead of rising in the meantime you

(Testimony of A. Graeber.)

would have sustained a loss in any event?

A. Oh, yes.

Q. So, unless a merchant in Chefoo, for instance, settles his exchange at the time he makes his contract it is a pure gamble? A. Yes, sir; it is a gamble.

Q. Now, you stated that one of these flour dealers with whom you had made a contract or at least I understood [146] you to say that he was on the verge of bankruptcy at the time you undertook to enforce him to take delivery of the flour he had contracted with you to take—was he actually bankrupt then? A. No; he was not.

Q. Did he become a bankrupt subsequently?

A. The firm was dissolved. The capitalists of the firm were well known in Chefoo and there was some rich men among them.

Q. You mean the firm went into liquidation and was wound up? A. Yes, sir.

Q. Do you know whether they paid off their indebtedness or not?

Mr. FLEMING.—I think the records of what proceedings were had in the case would be the proper and only evidence.

A. No; I don't know exactly, but I think they did.

Mr. FLEMING.—I move to strike out the latter part of the answer, your Honor, the words "I think they did."

The COURT.—I will grant the motion to strike out that part of the answer "I think I did."

Mr. FESSENDEN.—Q. Were they indebted to Diederichsen & Company in any other business trans-

(Testimony of A. Graeber.)

action at this particular time? A. No, sir.

Q. You had done business with this firm prior to all these transactions you have mentioned here?

A. Yes, sir.

Mr. FESSENDEN.—Mr. Fleming, yesterday I pointed out to you and made a written computation in our bill of particulars with that amount of Chefoo tael one hundred forty-nine and twenty-three hundredths included in the calculation of profit on five thousand [147] sacks of flour which had not been sold prior to the arrival of the cargo. If you have no objection I will put in an amended calculation?

Mr. FLEMING.—I have no objection.

The COURT.—The five thousand sacks of flour were taken over by the firm of H. Diederichsen & Company itself and from your point of view there should be no claim of profit on that five thousand sacks of flour?

Mr. FESSENDEN.—Yes, sir; one hundred and twenty-five dollars gold. It reduces that amount.

Mr. FLEMING.—Will you amend your bill of particulars?

Mr. FESSENDEN.—Yes, sir. It would amount to two hundred and fifteen taels.

The COURT. It is an admission on the part of the plaintiff that the gross amount in the bill of particulars would be reduced to that extent, two hundred and fifteen taels.

Mr. FESSENDEN.—That is all.

Recross-examination.

Mr. FLEMING.—Q. Now, Mr. Graeber, you have

(Testimony of A. Graeber.)

stated in answer to Mr. Fessenden that if you had not settled exchange in October, 1911, that this flour deal would have been a pure gamble. I put it to you that every time you settle exchange it is a gamble?

A. No, sir; it is just the reverse. Every time I settle exchange when I make a contract it is no gamble, it is pure business.

Q. When you take security from your buyers don't you get from them a confirmed letter of credit?

A. No, sir.

Q. Do you get any security from them on the deal?

A. Our compradore is responsible for that. [148]

Q. Did you sue your compradore on these Chinese flour contracts? A. No, sir; I did not.

Q. Why didn't you sue him?

A. It was not up to him to pay this amount because it was a breach of contract on the part of Connell Brothers Company and we were entitled to refuse to take delivery under the contract, I think.

Q. Still, the contract says, "in or after the 3d Moon," and that would be March and there would be no breach of contract if the cargo of flour arrived in April?

A. Yes, sir; it would be according to Chinese.

Q. So you had no confirmed letter of credit from the Chinese flour buyers who had contracted with you to take a portion of this flour? A. No, sir.

Q. They had put no security up in any foreign bank? A. No, sir.

Q. Nor with you or with your firm? A. No, sir.

Q. You merely took your compradore's guaran-

(Testimony of A. Graeber.)

tee? A. Yes, sir.

Mr. FLEMING.—That is all.

Mr. FESSENDEN.—Q. Mr. Graeber, what do you mean by the compradore guaranteeing the sales?

A. In case one of these buyers had gone bankrupt the compradore would be responsible for the money. We have a guaranteed compradore. The guarantee says that any contracts made with his knowledge with the Chinese he is responsible for.

Q. You mean if a Chinaman went bankrupt?

A. Yes, sir; and he could not pay the compradore would have to make the loss good. [149]

Q. What was the compradore's guarantee?

A. Didn't I answer that?

Q. Explain that—what you call the compradore's guarantee—what it covers?

A. Any loss that the firm should sustain through Chinese buyers going bankrupt or so on the compradore has to make good providing the business was done with the knowledge of the compradore.

The COURT.—Q. Mr. Graeber, is your compradore's guarantee in writing?

A. Oh, yes, sir; stamped and so on and put down in writing in Chinese and English and properly written.

Mr. FLEMING.—If your Honor please, now that it has developed that the compradore's guarantee is in writing I move to strike out all this testimony relating to that subject.

The COURT.—I think you will have to produce the guarantee, Mr. Fessenden, if you want that class

(Testimony of A. Graeber.)

of testimony to remain in the record.

Mr. FESSENDEN.—I cannot produce it now, your Honor, as we have not got it here.

Mr. FESSENDEN.—Q. Mr. Graeber, have you got that compradore's guarantee with you?

A. No, sir; it is in my safe in Chefoo.

The COURT.—I don't think we should admit anything pertaining to that guarantee except the guarantee itself is produced.

Mr. FESSENDEN.—I don't know as to why any testimony was offered concerning the compradore's guarantee.

Mr. FLEMING.—As I understand your Honor's ruling it is that everything the witness has stated regarding the guarantee of the compradore is excluded from the record.

The COURT.—That is the ruling at present.
[150]

Mr. FESSENDEN.—I will claim the right to produce the guarantee of the compradore if I think it necessary.

Mr. FESSENDEN.—That is all.

Mr. FLEMING.—That is all.

[Testimony of Ho Lien Shen, for Plaintiff.]

HO LIEN SHEN, called as a witness on behalf of plaintiff, sworn and testifies:

(Sworn through the Chinese Interpreter, Ou Yang Kong.)

Mr. FESSENDEN.—Q. You are the compradore of H. Diederichsen & Company at Chefoo, China?

A. Yes, sir.

(Testimony of Ho Lien Shen.)

Q. And for how many years have you been compradore of H. Diederichsen & Company of Chefoo?

A. Four years.

Q. Do you remember a shipment of eighty thousand bags of flour to H. Diederichsen & Company of Chefoo from America by the steamer "Harpagus"?

A. Yes, sir.

Q. Did you have anything to do with the selling of that flour for H. Diederichsen & Company to the Chinese at Chefoo?

A. Yes, sir.

Q. Can you tell us what that is (handing witness a paper written on in Chinese)?

A. (After examination.) That is a contract.

Q. Between whom?

A. Chinese dealers with the firm of H. Diederichsen & Company at Chefoo.

Q. Did you see that contract made?

A. Yes, sir; I did.

Q. Where was it made?

A. Made in our office, in the office of H. Diederichsen & Company, by the respective parties.

[151]

Q. By the respective parties thereto?

A. Yes, sir.

Q. And what is that chop on it?

A. The chop of the contract.

Q. What do you mean by the chop of the contract?

A. Lee Shing Tai chop.

Q. Did you see it chopped?

A. Yes, sir, I did.

Q. That contract was made out for two parties, was it not?

A. Yes, sir.

(Testimony of Ho Lien Shen.)

Q. That is it was made in two parts, duplicates, was it not?

A. Yes, sir; made in duplicate—two made.

Q. Do you know what was done with the other part? A. The other part was given to the dealer.

Q. The flour dealer? A. Yes, sir.

Q. Who had contracted in this paper contract to buy more or less flour at a certain figure?

A. Yes, sir.

Mr. FESSENDEN.—If your Honor please, here is a contract written in the Chinese language and my intention was to ask him to translate that, but it still has to go through the interpreter.

The COURT.—You have already offered a translation of it that was made yesterday by your interpreter.

Mr. FESSENDEN.—Yes, your Honor, a translation was made yesterday by my interpreter, but it was hurriedly done and there may be some question arise as to the correctness of that translation so made in court.

The COURT.—If there is any question about the correctness of the translation you had better have it translated [152] over.

Mr. FLEMING.—There is one thing only I wish to ask Mr. Kong, Mr. Fessenden's interpreter, about in his translation made yesterday of this contract, your Honor.

The COURT.—You can ask him.

Mr. FLEMING.—Q. Mr. Kong, when you translated this contract written in Chinese into English

(Testimony of Ho Lien Shen.)

yesterday you stated "the cargo shall be delivered in or about the 3d Moon, 1912," and in this translation attached to the contract in Chinese which Mr. Graeber had made by the German Consulate—

Mr. GRAEBER.—I had it made, but this is not the one.

Mr. FLEMING.—Q. (Continuing.) Then this translation attached to the contract reads, "within or after March, 1912." I will ask you if it is not a fact that the Chinese characters used in the contract for that expression are plainly written and the proper translation of them is "within or after the 3d Moon, 1912"?

A. I only interpreted the document so hurriedly and it is so written that it requires a little study in places. I will look at it again if you will let me see it. (Contract handed witness.) That part is "inside or outside of March 1912," if I interpret it word for word, but the following character is "March, 1912."

Q. I will ask you, Mr. Kong, if "within or after March, 1912," would not be a correct translation for that character?

A. I cannot say. I think the agreement or document is not literal, it is very mixed "inside or outside March."

Q. So your translation of that part of the contract [153] would be "inside or outside of March, 1912"—would that be the understanding you would have of it?

A. Of course. The word March is in it and the

(Testimony of Ho Lien Shen.)

next character means "inside or outside." The word "ya" in Chinese means outside. "Within and after" I cannot make out of it.

Q. "Within or after March," wouldn't that be the correct translation of that character or those characters? A. The word "after" is not in it.

Q. Don't that character mean that—isn't that the sense of it?

A. Ya (wai) means "outside" and after is "e-sha." There is no Chinese character "after."

Mr. FLEMING.—If your Honor please, I will ask to have my interpreter sworn.

Y. C. NEY, sworn as Chinese Interpreter.

Mr. FLEMING.—Q. Mr. Ney, I will ask you to look at the characters or clause in that document, this Chinese contract which I now hand you, that particular clause where it states the time of delivery and give us your interpretation of it.

A. (Reading from contract.) It says "delivery shall be made within or after March, 1912."

Q. "Within or after March, 1912"?

A. Yes, sir; because otherwise it would make no sense.

Q. Otherwise the document will not make sense you say? A. Yes, sir.

Mr. FESSENDEN.—Q. It uses the word "ya" (wai), does it not?

A. Outside March means after March.

The COURT.—Q. You say the Chinese phrase "ya" (wai) means outside? A. Yes, sir. [154]

Q. And you say that is equivalent to "after"?

(Testimony of Ho Lien Shen.)

A. Yes, sir.

Q. "After March" would that mean any time after March?

A. Any time after March but not after April.

Mr. FLEMING.—Q. It would mean any time during the month of March to the next month?

A. Yes, sir.

Q. That is your translation of that clause?

A. Yes, sir.

Q. It could not be, however, more than one month or thirty days?

A. No, sir; it could not be more than one month.

The COURT.—Q. Mr. Kong, what is your definition of that clause?

A. "Inside or outside." If it was the intention of the parties that it should be one month then they would say "within or after April."

Q. What does "ya" (wai) mean according to interpretation or translation?

A. "Ya" (wai) is outside in Chinese. The Chinese is not so very particular about days and a few days after any month is nothing to them.

Q. Your interpretation or what you think is a fair interpretation of "after March" would be some small period of time after the month of March?

A. Yes, sir.

Mr. FLEMING.—Q. Could it be ten days afterwards or twenty days afterwards?

A. I would say fixing any period nearer than ten days they would put in "within or after."

The COURT.—I would suggest in this matter as

(Testimony of Ho Lien Shen.)

there seems to be a wide difference in the translation of this clause by these interpreters, that counsel [155] agree upon some disinterested, competent Chinese interpreter who has no relation with either of the parties and get his interpretation of this contract and particularly that clause.

Mr. FESSENDEN.—We will do that, your Honor, and I will offer this contract in evidence at this time and ask to have it marked as an exhibit in the case on behalf of plaintiff.

(Marked and filed Plaintiff's Exhibit "H.")

Mr. FLEMING.—I want to have my general objection go to all this class of evidence, your Honor, and to the evidence given respecting this contract and the contract itself.

The COURT.—That has been my understanding all along, Mr. Fleming, that this evidence was coming in over your objection and that you were excepting to it.

Mr. FESSENDEN.—I so understood it, your Honor.

Mr. FLEMING.—I want to reserve my exception to this line of evidence. With the exception of that one clause in the contract Mr. Fessenden's interpreter agrees with my interpreter.

Mr. FESSENDEN.—Q. Mr. Shen, do you know when this cargo of flour arrived in Chefoo?

A. On the 16th of April.

Q. On the 16th of April, 1912? A. Yes, sir.

Q. Did the flour dealers mentioned in that flour

(Testimony of Ho Lien Shen.)

contract take delivery of the cargo upon its arrival in Chefoo?

A. They did not take delivery of the cargo at all.

Q. Did they give any reason to you why they refused to take delivery?

A. They said the flour arrived too late. [156]

Q. Subsequently did you as compradore of Diederichsen & Company at Chefoo sell or effect a sale of any of this cargo of flour to other people than those mentioned in this contract?

A. Yes, sir; he did. Yes, sir; sold to others subsequently.

Q. Sold through you as compradore of Diederichsen & Company? A. Yes, sir.

Q. Did you have written contracts for these subsequent sales?

A. We did not have contracts in the safe but we had people's accounts.

Q. Just what do you mean by "accounts"—explain what you mean by "accounts."

A. When we sold the cargo, for instance, for the five thousand sacks there was a market price on that day and we sold such cargo to the dealer and he paid us cash money. It was not necessary to have any contract.

Q. Did you have any memorandum of sale?

A. Yes, sir; we have memorandum of accounts. When we deliver five thousand sacks we sign them, sign a memorandum, and they sign a receipt for the five thousand sacks.

(Testimony of Ho Lien Shen.)

Q. Ask him what these are (showing witness some receipts).

A. (After examination.) These are the accounts or memorandum of account or sales.

Q. Sales of how many sacks of flour?

A. Sales of seventy-five thousand sacks of flour.

Q. Do those memorandums state the names of the buyers and the price received for the flour?

A. Yes, sir; everything is contained therein.
[157]

Q. Is this your handwriting (showing witness papers)?

A. (After examination.) Yes, sir.

Q. All of these translations in English are yours?

A. Yes, sir.

Q. And what are these?

A. Translations of these Chinese accounts or memorandum of sales.

Mr. FESSENDEN.—I offer them in evidence and ask to have them marked and filed as an exhibit for plaintiff.

Mr. FLEMING.—We object, your Honor, on the grounds that they are incompetent, irrelevant, immaterial and do not tend in any way to prove or establish damage in this case.

The COURT.—I will admit them in evidence.

Mr. FLEMING.—Save an exception.

(Marked and filed Plaintiff's Exhibit "I.")

Mr. FESSENDEN.—Q. Were you as compradore of Diederichson & Company of Chefoo familiar with the flour market in Chefoo or the general flour mar-

(Testimony of Ho Lien Shen.)

the flour market in Chefoo or the general flour market? A. Yes, sir; I am.

Q. Say from October, 1911, down—that contract between Diederichsen & Company and Connell Brothers Company was October, 1911—were you familiar with the flour market from the date of the contract down to the time the flour was sold—the last sale of flour was in October, 1912?

A. I cannot tell you in exact taels but I can tell you roughly.

Q. I want to know roughly the market condition for flour in Chefoo from March, 1912, to October, 1912.

A. In October, 1911, over taels 1.80 cents per sack.

Q. For what grade of flour was that?

A. “Gold Cash” and “Red and Blue Characters.”
Between [158] 1.80 and 1.90 taels per sack.

Q. Do you know the “Morjon” brand of flour?

A. “Red Morjon” was a new chop. What we ordered at the time of making the contract between Diederichsen & Company and Connell Brothers Company was 1.83, Shanghai taels 1.83.

Q. I asked him if he knows this brand of flour called the “Morjon,” if he knows the brand of flour called the “Morjon” brand? A. Yes, sir.

Q. Now, does he know how this brand of flour called the “Morjon” brand was regarded in the Chefoo flour market in competition with the other brands he mentioned? No answer.

Q. Ask him if he knows how they compared in the Chefoo flour market—I mean in quality in comparison with the other brands of flour he mentioned—

(Testimony of Ho Lien Shen.)

“Red and Blue Characters” and “Gold Cash”?

Mr. FLEMING.—We object, your Honor, on the grounds that the witness has not shown himself to be competent to answer.

The COURT.—He has testified he is familiar with the flour market of Chefoo and has been since October, 1911.

Mr. FLEMING.—Save an exception.

Mr. FESSENDEN.—Q. Tell him to answer the question, please :

A. The “Red Morjon” is a new chop. Although the quality of the flour is practically the same the price for “Red Morjon” is four or five cents cheaper than the other marks or chops.

Mr. FLEMING.—We now move, if your Honor please, to have [159] that answer stricken out on the grounds that the witness has not shown himself to be an expert or one familiar with the flour market of Chefoo and the different brands of flour marketed there.

The COURT.—The motion is denied.

Mr. FLEMING.—Save an exception.

Mr. FESSENDEN.—Q. How does the “Morjon” brand of flour compare in quality in the Chefoo flour market with these two other brands he has mentioned—“Red and Blue Characters” and “Gold Cash”?

A. The quality is not much inferior to the other brands but the “Red Morjon” is a newer brand than the others.

Q. So far as he knows it is a fact as he states that

(Testimony of Ho Lien Shen.)

the "Morjon" brand of flour is not so well known in Chefoo and does that affect the price of the "Morjon" brand in the Chefoo flour market?

Mr. FLEMING.—We object, your Honor, on the grounds that it is leading and calls for an opinion.

The COURT.—Objection sustained.

Mr. FESSENDEN.—Q. Now, you stated that the market for this "Morjon" brand of flour, the price, was about 1.80 to 1.90 taels in October, 1911—was there any change in the market price subsequent to that time?

A. Not much change at that time.

Q. Well, now, was there any change at any time in the same year?

A. Yes, sir; there was a change.

Q. When did a change first take place?

A. At the beginning of 1912 or the end of 1911.

Q. What change took place then?

A. There was only a little change. It was about taels 1.75 or 76, Chefoo taels, per sack.

Q. Subsequent to that time any change take place?
[160]

A. February or March about 1.72 or 1.73 taels.

Q. April? A. April 1.68 or 1.69.

Q. So far it was a general decline in the market?

A. Yes, sir.

Q. Then from April on was there any change in the market?

A. After April there was a good harvest in the native places and the market gradually declined.

Q. After April?

(Testimony of Ho Lien Shen.)

A. Yes, sir; there was a harvest of native wheat.

Q. Well, how was the market for May, June and July?

A. There was wheat in April and in the beginning of May there was flour from the new wheat and there was no need of foreign flour.

Q. But between—what can he say about the market price of flour in Chefoo—as to whether there was any change in the market price from the latter part of March to the middle of April?

A. At the end of March it was 1.68 and in the middle of April it was about 1.60 or even less.

Q. Now, can he tell us when between October, 1911, and October, 1912, the market touched its lowest point?

A. In August or September, 1912. That was the lowest point.

Q. That was the lowest point the market reached in the year? A. Yes, sir.

Q. Do any other reasons suggest themselves to you regarding the decline in the flour market of Chefoo besides the native wheat crop and the importation of flour from Shanghai and Hongkong?

A. Yes, sir. According to the contract between H. Diederichsen & Company and Connell Brothers Company the [161] flour to be shipped would be in Chefoo in March and the Chinese expected that flour would rise in March and Chinese dealers ordered flour from Shanghai and Hongkong for smaller orders and when the steamer from America with flour arrived in Chefoo there was plenty of flour in Chefoo

(Testimony of Ho Lien Shen.)

and for some time afterwards.

Mr. FLEMING.—We move to strike that answer out, your Honor, as being hearsay evidence and not responsive to the question.

The COURT.—Motion granted.

Mr. FESSENDEN.—That is not what I wanted to get at from him; that is his own idea. I asked him if he could assign any other or further reason why the flour market at Chefoo declined.

INTERPRETER.—I have not finished—something more.

The COURT.—Never mind that.

Mr. FESSENDEN.—Q. Ask him if the seasons have anything to do with the market price of flour in Chefoo? A. Certainly.

Q. What effect do they have?

A. I told you just now. There was a harvest of wheat and then there was the hot and rainy season and no market for flour.

Q. In selling this flour that you say you sold what steps did you take to ascertain the market at the time you made the sale?

A. We have the market shroff to find out the market for us.

Q. At the time you made these sales did you ascertain the price at which other dealers were selling similar flour? A. Yes, sir; certainly.

Mr. FESSENDEN.—Take the witness. [162]

Cross-examination—Y. C. NEY, Interpreter.

Mr. FLEMING.—Q. Now, I will ask you if it is not a fact that the price of flour throughout the

(Testimony of Ho Lien Shen.)

months of March and April, 1912, in Chefoo did not vary greatly?

A. There was no big difference.

Q. That the price while lower in April than it was in March, 1912, was steady throughout April and March although the price was lower than it was in October, 1911—the flour market was steady during the months of March and April, 1912, lower and steadier?

A. The witness says in October, 1911, there was a nice market.

Q. Was the flour market steady in March and April, 1912? A. There was a change.

Q. There was a change from October of the previous year?

A. Yes, sir, there was a decline.

Q. What was the change—I will put it that way?

A. In March there was no big difference but in April and May there was a big difference.

Q. What was the price of flour in the market of Chefoo in the months of March and April?

A. About taels 1.75 or 6, Chefoo currency.

Q. What was it in February?

A. He said about taels 1.70.

Q. Chefoo taels?

A. Yes, sir. One tael 75 or 6.

Q. In February? A. Yes, sir.

Q. And the same thing in March?

A. A difference of one cent only.

Q. I will ask you what it was in May.

A. One tael sixty-eight, sixty-seven or sixty-eight.

(Testimony of Ho Lien Shen.)

[163] One tael sixty-five or sixty-six.

Q. When was that—in May? A. Yes, sir.

Q. What was it in June?

A. It was declining.

Q. I will ask you if that decline did not begin about the middle of May or the first of June—if the chief decline in the price of flour did not begin about the middle of May or first of June?

A. He says he will have to look at the accounts; he says there was a decline in May.

Q. The flour market began to decline in May?

A. He says it began in March and so on—April and May.

Q. I put it to you that from between the first of March and the 15th of May there was very little difference in the price of flour at Chefoo?

A. There was a big difference. He said there was a little change in March and there was a big change in April.

Q. A big change after April?

A. April or May, between April and May.

Q. There was very little change in the price of flour in Chefoo in April from the price of flour in March?

A. He says a little difference in March. There was a big change in April.

Q. When was the big change in April?

A. At or near the end of April.

Q. At or near the end of April?

A. Yes, sir; because at that time that was the time when the wheat crop was approaching.

(Testimony of Ho Lien Shen.)

Q. Now, what wheat crop was approaching?

A. In the interior of Shantung.

Q. Then this decline began at the end of April, the [164] big decline you speak of?

The COURT.—I have his answer “the latter part of April.”

Mr. FLEMING.—Q. The end of April you mean the big decline began? The last day of April?

A. I did not say it began in the end of April. I have told you before it began in March. A small change in March and a big change in April.

Q. What time in April was there a big change?

A. In the latter part of April.

Q. Well, by that do you mean the last few days of April? A. Not that the witness says.

The COURT.—Q. Ask him if he can fix the date in April when the largest decline began.

A. He says the declination began since March.

Mr. KONG (Interpreter).—He says “beginning from March.”

Mr. FLEMING.—Q. From the end of March what was the general price of flour you have been describing? A. You ask the market price in Chefoo?

Q. Yes, sir; Chefoo.

A. One tael sixty-five or six. I cannot tell. The witness says he cannot remember the market price on the last day of April.

Mr. FESSENDEN.—Q. He says he cannot remember each day? A. Yes, sir.

Mr. FLEMING.—Q. About what was it on the last day of April?

(Testimony of Ho Lien Shen.)

A. He says he cannot tell but it was about one tael sixty or more. Taels one sixty-five or six.

Q. What was it at the end of March?

A. I cannot tell you the market price at the end of March, but I can say in March the market price of flour.

Q. All right, what was the market for flour in Chefoo in March?

A. The market price in February and March taels one [165] seventy or so—one tael seventy-five.

Q. What does he say?

A. He says one tael seventy-five.

Q. That was in March?

A. February and March; that was the market price of flour in February and March in Chefoo.

Q. Now, in answer to Mr. Fessenden you stated that the market price of flour in Chefoo for February and March, 1912, was taels one and seventy-two or seventy-three?

A. He says that was the market price for February and March.

Q. Now, which was it—what you said first or what you said last?

A. That was the market price for February and March.

Q. Now, in answer to Mr. Fessenden you stated the market price of flour in Chefoo for February was taels one sixty-nine to one-sixty-eight, and in answer to the same question from me he answered it was one tael sixty-four or one sixty-six—one tael

(Testimony of Ho Lien Shen.)

sixty-four or one sixty-five. Now, I ask him which was correct.

A. He says he cannot tell exactly. It was one tael sixty cents or so. We have the accounts which you can look at.

Q. You say that wheat is raised in Shantung Province? A. Yes, sir.

Q. I will put it to you that that wheat crop is not harvested until June in that province?

A. It is the Chinese 5th Moon.

Q. Mr. Kong, that is June, is it not?

Mr. KONG.—A. The Chinese 5th Moon is June.

Mr. FLEMING.—That is all.

Mr. FESSENDEN.—That is all. [166]

[Testimony of Lu Chi Fung, for Plaintiff.]

LU CHI FUNG, called as a witness on behalf of the plaintiff and sworn.

(Sworn through OU YANG KONG, Chinese Interpreter.)

Mr. FESSENDEN.—Q. You are a flour merchant of Chefoo, are you not? A. Yes, sir; I am.

Q. How long have you been in the flour business in Chefoo? A. About three years.

Q. Do you deal in foreign flour in Chefoo?

A. Yes, sir.

Q. How much—what is the volume of your flour business in Chefoo in a year—about we will say?

A. Three or four thousand sacks a year.

Q. Do you know the “Morjon” brand of flour?

A. Yes, sir; that is a new brand.

Q. Do you know the “Gold Cash” and the “Red

(Testimony of Lu Chi Fung.)

and Blue Characters” brand of flour?

A. Yes, sir.

Q. Do you know how they compare in price and quality in the Chefoo flour market with the “Morjon” brand of flour—how the “Gold Cash” and the “Red and Blue Characters” brands of flour compares with the “Morjon” brand of flour in the Chefoo flour market?

A. The quality of the flour is practically the same but the “Morjon” brand is a new brand in Chefoo and the market price for that in Chefoo is slightly different.

Q. What does he mean by “slightly different”?

A. One or two cents.

Q. Which way up or down?

A. One or two cents cheaper.

Q. Does he know what was the market price of any one of [167] these three brands of flour in Chefoo just prior to February and March, 1912?

A. About one tael seventy-four, five or six.

Q. In February or March? A. Yes, sir.

Q. Do you know whether there was any change in the market price of flour in Chefoo after March, 1912?

A. The market was declining.

Q. When did the market begin to decline?

A. In the early part of April.

Q. Can he tell us how much the market declined in the early part of April—how much the difference in price was from March to the early part of April?

A. Two or three cents cheaper in the early part of March.

(Testimony of Lu Chi Fung.)

Q. In the early part of April?

A. Yes, sir; April.

Q. How much did you say?

A. Two or three cents cheaper.

Q. Then was there any decline from the early part of April to the end of April?

A. In the latter part of March—

Q. (Interrupting.) March or April?

A. In the latter part of April there was a declination every day of one or two cents a day.

Q. Can you say what time that decline in April commenced—about what time in April—the first few days or the middle or about what time?

A. After the 16th or 17th the market declined every day.

Q. What does he say the price of flour was in Chefoo at the end of April?

A. At one tael sixty or a little more.

Q. About one tael sixty? A. Yes, sir.

Q. And after April, after the end of April, say May— [168] any decline in May?

A. The decline continued.

Q. Continued in May? A. Yes, sir.

Q. Can he say about what was the price in May?

A. At taels one fifty-five or fifty-six.

Q. From May on or say from June to September can he say what was the tendency of the flour market in Chefoo during that period?

A. Continued to decline.

Q. Continued to decline? A. Yes, sir.

Q. Can he give us any idea when the market

(Testimony of Lu Chi Fung.)

reached its lowest point?

A. In August it was so low as one tael forty.

Q. August, 1912, it was so low as taels one forty?

A. Yes, sir.

Mr. FESSENDEN.—Take the witness.

Cross-examination.—Y. C. NEY, Chinese
Interpreter.

Mr. FLEMING.—Q. Ask him, Mr. Ney, if he means to say that there was foreign flour for sale in Chefoo in August for taels one forty per bag?

A. Yes, sir.

Q. Do you know how much the price in Shanghai was at that time?

A. I do not know the market of Shanghai.

Q. Did you ever inquire?

A. I did not make any inquiry.

Q. Do you know that Chefoo is supplied from Shanghai with flour very largely?

A. Yes, sir; some coast ships from Shanghai carry flour to Chefoo.

Q. Don't most of the flour that goes to Chefoo come from [169] Shanghai? A. Yes, sir.

Q. And isn't the price of flour in Chefoo governed largely by the market price of flour in Shanghai?

Mr. FESSENDEN.—We object, your Honor, on the grounds that the question calls for an opinion.

Mr. FLEMING.—Q. (Continuing.) And the price of flour in the Chefoo market is a reflection of the flour market prices in Shanghai?

Mr. FESSENDEN.—I make the same objection

(Testimony of Lu Chi Fung.)

and add to it that it is not proper cross-examination.

The COURT.—The objection is sustained.

Mr. FLEMING.—Save an exception.

Mr. FLEMING.—Q. Now, what is the price of flour, foreign flour, this brand known as “Morjon” or other brands of similar quality—what was it worth or selling for in Chefoo in February, 1912?

A. There was not such a brand as “Red Morjon” in the market at Chefoo in February, 1912.

Q. Well, flour of a similar quality as the “Morjon”?

A. Taels one seventy-eight or seventy-nine and probably one eighty.

Q. In February, 1912? A. Yes, sir.

Q. And up to March 15th what was the price of flour, foreign flour, of similar quality to the “Morjon” brand?

A. Taels one seventy-four or one seventy-five.

Q. Now, in the early part of April what was the price? A. Several cents cheaper.

Q. How much would you say?

A. At about one seventy-one to one seventy-three.

Q. On the 20th of March, 20th of April, what was the price? [170]

A. Much cheaper. A little over taels one fifty.

Q. On the 20th of April a little over taels one fifty—did he say that—a little over taels one fifty?

A. Yes, sir.

Q. That was the 20th of April a little over taels one fifty?

A. It was fifty-seven or eight or nine, not one

(Testimony of Lu Chi Fung.)

fifty on the 20th of April.

Q. On the 16th of April what was the price or about the price?

A. About one sixty or less.

Q. That was the 16th of April? A. Yes, sir.

Q. On the 10th of April what was the price?

A. Taels one sixty.

Q. On the 1st of April what was the price?

A. Taels one sixty-one or one sixty-two.

Q. On the 15th of March what was the price?

A. Taels one sixty-five, six or seven.

Q. On the 20th of March what was it then?

A. Taels one sixty-five or one sixty-six.

Q. About the 25th of March what was it?

A. Probably at taels one sixty-seven or sixty-eight.

Q. And did that price continue up to the end of March?

A. Maybe one cent or half a cent difference.

Q. Higher or lower?

A. One cent cheaper.

Mr. FLEMING.—That is all.

Redirect Examination—OU YANG KONG, Chinese Interpreter.

Mr. FESSENDEN.—Q. Did I understand you to say that you bought or dealt in about five thousand sacks of foreign flour yearly in Chefoo?

A. No, sir; not so much quite. About three or four thousand [171] sacks.

Q. Three or four thousand sacks per year?

A. Yes, sir.

(Testimony of Lu Chi Fung.)

Q. That is all you handle the whole year?

A. Yes, sir; sometimes more and sometimes less.

Q. What is the largest amount of flour you have dealt in? A. Oh, forty thousand.

Q. You mean then by your answers that it is all the way from three or four thousand to forty thousands sacks a year? A. Yes, sir.

Mr. FESSENDEN.—That is all.

Recross-examination—Y. C. NEY, Chinese Interpreter.

Mr. FLEMING.—Q. What year did you deal with forty thousand sacks or bags of foreign flour in Chefoo? A. Year before last.

Q. And whom did you buy that flour from?

A. From the flour dealers in Chefoo.

Q. You mean in the year 1912?

A. The year 1911.

Q. What brands of flour were those?

A. “Gold Cash” and “Red and Blue Characters.”

Q. How many bags of “Gold Cash” did you handle?

The COURT.—What is the object, Mr. Fleming, of going into all the details connected with the handling and sale of these forty thousand sacks of flour in 1911?

Mr. FLEMING.—We doubt this statement of this witness that he ever dealt with any forty thousand sacks of flour in Chefoo any one year. He is offered here as a big flour dealer of Chefoo and we think we can show he is not.

The COURT.—If you assure me that you can fur-

(Testimony of Lu Chi Fung.)

nish proof of that character I am willing you should go into it. [172]

Mr. FLEMING.—I have only one or two more questions to ask of this witness, your Honor.

Mr. FLEMING.—Q. What is your average turn-over in flour yearly—how many bags of flour do you handle per year?

A. Thirty thousand odd sacks of flour.

Q. What did you mean when you told the Court originally that you handled from three to four thousand sacks of flour per year?

A. I mean thirty or forty thousand.

Q. You meant you handled yearly from thirty to forty thousand sacks of flour yearly in Chefoo?

A. Yes, sir.

Mr. FLEMING.—That is all.

Mr. FESSENDEN.—That is all of this witness and that is all the witnesses I have, your Honor. [173]

Plaintiffs' Exhibit "B" [Translation of Code Telegram, Dated April 8, 1912].

Translation of code telegram, April 8th, 1912, to Connell Brothers, Shanghai, as follows:

IMBRONCIA

Harpagus

we are informed

sailed

Pougetsound

MAGENREIZ

14th day of March

REELIRE

we must hold you responsible for nonperformance of contract

	buyers
	making
	heavy
	claims
	or
RASSALTO	will refuse the goods (cargo)
CHASCASS	communicate with
	our
	Shanghai
	Office

**Plaintiffs' Exhibit "C" [Translation of Code
Telegram, Dated April 17, 1912].**

Translation of code telegram, sent 17th April, 1912, from H. Diederichsen & Co., Chefoo, to Connell Bros. Company, Shanghai, as follows:

	Harpagus
	arrived
GANTIEZ	consignees buyers refuse to
	receive
	the goods
DESATARIAN	is at your disposal

**Plaintiffs' Exhibit "D" [Protest of Messrs. H.
Diederichsen & Co., Dated April 10, 1912].**

AMERICAN CONSULATE.

Chefoo, China, May 26, 1913.

I, Julean H. Arnold, American Consul at Chefoo, China, do hereby certify that the attached document is a true and correct copy of the original protest of Messrs. H. Diederichsen & Co., dated April 10, 1912, and filed in this consulate in Volume M. R. No. 38, page 228.

In witness whereof I have hereunto set my hand
[174] and seal of office this twenty-sixth day of
May, one thousand nineteen hundred and thirteen.
[Seal of the American Consulate at Chefoo, China.]

JULEAN H. ARNOLD,
American Consul.

COPY.

H. DIEDERICHSEN & CO.

Gr.

Chefoo, Shanghai, Tsingtau, Tientsin,
Tsinanfu, Hankow, Kiel, Hamburg.

Chefoo, 10th April, 1912.

Telegram *Adresse*: "HADIDE."

A. B. C. Code 4th & 5th Editions.

A. I. Code.

Sir,

We beg to file with the U. S. Consulate a protest
against our payment made yesterday in settlement
of Messrs. Connell Bros. Company's draft amount-
ing to Gold—\$83.000,—(drawn on us against ship-
ment of 80.000 bags of American flour per S.S.
"Harpagus") for non-fulfilment of contract (dated
the 17th day of October, 1911), and reserve ourselves
the right to hold Messrs. Connell Bros. Company
responsible for all claims which will arise in conse-
quence of violation of this contract.

We are, Sir,

Your obedient servant,

P. Pa. H. DIEDERICHSEN & CO.

(Signed) A. GRAEBER,

U. S. Consulate

Chefoo.

No. 827.

I herewith verify the above signature of the German firm H. Diederichsen & Co., Chefoo,—

Chefoo, 10th April, 1912.

[Seal German Consulate]

(Signed) Dr. PH. LENZ,

H. I. G. M.'s Consul. [175]

Plaintiffs' Exhibit "E" [Statements of Account].

This exhibit is made up, of nineteen separate statements of account showing the payment of the aggregate amount of Shanghai taels 3,626.36 by the plaintiffs to the Russo-Asiatic Bank at Chefoo as interest on a draft for Gold \$83,000.00. Said interest being converted into Shanghai taels at an exchange rate of one tael for each 58 cents United States Gold.

Plaintiffs' Exhibit "F" [Statements of Account].

This exhibit is made up of seven separate statements of account showing that the plaintiffs were charged by L. H. Smith & Co. of Chefoo with storage on flour to the aggregate amount of 425 Mexican Dollars.

Plaintiffs' Exhibit "G" [Statement of Account].

NO MARGIN ALLOWED.

Chefoo, 17th October, 1911.

BOUGHT From the RUSSO-ASIATIC BANK.

Purchaser.	Amount.	Usance.	Rate.	Delivery.
H. Diederichsen & Co.....	G. \$83000	TT.	58	Feb./April

No. ——— Entered for £———

BANQUE RUSSO-ASIATIQUE, CHEFOO,

Broker. \ [176]

Plaintiffs' Exhibit "H" [Contract].

This exhibit is a document in the Chinese language and a translation thereof. The translation of the same is as follows:

CONTRACT.

The contract is made between Li Chengtai, and H. Diederichsen & Co., Chefoo for 70,000 bags (Seventy thousand) American flour Red Morjon Brand, namely:—

Li Cheng Tai	30,000	bags	Red	Morjon	Flour
Tsung Sheng Yi	20,000	"	"	"	"
Yung Ho Chang	20,000	"	"	"	"

70,000

Cargo shall be delivered within or after March, 1912. c. i. f. Chefoo.

Quality must be equal to the sample which is sealed up by both sides.

Weight should be equal to that of Dayton Brand.

Price S'hai Tls 1.831 $\frac{1}{5}$ per bag payable against delivery on Shanghai cheque.

Should the cargo not be arrived at the time mentioned, or the quality not equal to the sample, the seller or buyers have the right to cancel the contract.

For there is in lack of witness therefor the contract is drawn up.

Plaintiffs' Exhibit "I" [Statement of Account].

This exhibit is a statement of account in the Chinese language representing sales of flour by the Compradore of the plaintiffs as follows:

Date, 1912.	No. of Bags.	Price C. Tls.	Che. Tls.	Less 2% Che. Tls.	Net Amt. Che. Tls.
May 24.	5000	1.58	7900.00	158.00	7742.00
" 28.	6000	1.57	9420.00	188.40	9231.60
June 1.	5000	1.56	7800.00	156.00	7644.00
" 15.	4700	1.55	7285.00	145.70	7139.30
" 15.	19300	1.54	29722.00	594.44	29127.56
Sept. 2.	19500	1.45	28275.00	565.50	27709.50
" 23.	<u>20500</u>	1.42	<u>29110.00</u>	<u>582.20</u>	<u>28527.80</u>
	80000		119512.00	2390.24	117121.76

[177]

The foregoing constitutes all of the evidence introduced on behalf of the plaintiffs and the plaintiffs thereupon rested. This cause was thereupon adjourned subject to call.

And be it further remembered that on the 23d day of October, 1913, the trial of this cause having been resumed, the following proceedings were had, to wit:

[Testimony of J. J. Connell, for Defendant.]

J. J. CONNELL, called and sworn as a witness on behalf of defendant, testified as follows:

Mr. FLEMING.—Q. Mr. Connell, what is your business?

A. I am in the merchandising business, exporting and importing.

Q. You are connected with the defendant in this action, Connell Brothers Company?

(Testimony of J. J. Connell.)

A. Yes, sir; I am the Vice-president of the company.

Q. As Vice-president of Connell Brothers Company, in the Orient, how do you act in connection with the company?

A. I act as the Oriental General Manager of the company.

Q. How long have you on behalf of your company been engaged in business in the Orient?

A. Fourteen years.

Q. Continuously or otherwise?

A. Continuously.

Q. And during this fourteen years what has been your general business in the Orient, that is as to classes of goods handled?

A. Importing flour is our principal business although we deal in many other classes of goods.

Q. And to what extent do you or the company of which you are [178] the vice-president and manager in the Orient import flour into the Orient?

A. We are considered the largest independent importers of flour into the Orient.

Q. The largest importers of flour into the Orient?

A. Yes, sir, we are of American flour undoubtedly.

Q. Now, during all this time you have been so engaged in the Orient as you have stated have you kept in touch with the market prices of flour both here and in the United States?

A. Yes, sir; we are in constant communication with the Seattle office, our Seattle office, and our branch offices in the Orient.

(Testimony of J. J. Connell.)

Q. In what way or in what currency are the market prices of flour imported from America fixed in China?

A. The prices are given in United States gold.

Q. That is the prevailing rule in China?

A. Yes, sir; the prices are quoted in United States gold both at Seattle and throughout China by our company.

Q. That is the importer quotes prices of flour in China in United States gold?

A. Yes, sir; the importer quotes in gold.

Q. At the time this contract was entered into between Diederichsen & Company and Connell Brothers Company in October, 1911, for the shipment of 80,000 bags of Morjon flour had your company any knowledge of what use Diederichsen & Company intended to make of that flour?

A. No, sir; no knowledge whatever. We presumed he was selling it to Chinese, or they were rather.

Q. You did not know on what terms or how or when, though? A. No, sir; we did not.

Q. Flour imported into the Orient is ordinarily sold to the Chinese?

A. Yes, sir; the flour is sold to foreigners and the foreigners generally make their contracts with [179] Chinese who sell and distribute the flour.

Q. But whether Diederichsen & Company had made contracts with Chinese flour buyers or how he made them or when he made them, of course, you do not know?

(Testimony of J. J. Connell.)

A. No, sir; we had no knowledge of any such contracts at all.

Q. You did not know anything about any contracts Diederichsen & Company may have made with Chinese flour merchants until this case was brought on for trial? A. No, sir; nothing at all.

Q. Mr. Graeber, manager of Diederichsen & Company of Chefoo, stated that prior to the arrival of this steamer "Harpagus" on April 8th, 1912, he had telegraphed you at Shanghai and also again on the 17th of April after the arrival of the vessel?

A. Yes, sir; he did.

Q. Now, he also stated that you did not answer the first telegram, the one of April 8th?

A. In the telegram of April 8th he asked me to call on the Shanghai office, to see his Shanghai head office here with reference to the shipment of flour purchased from us by Diederichsen & Company.

Q. And did you? A. Yes, sir.

Q. And told Diederichsen & Company here that you had received a telegram from their branch office in Chefoo relative to this shipment of flour and a request that you call on Diederichsen & Company here in Shanghai?

A. Yes, sir; that we had been asked to communicate with their office here.

Q. Well, you had some conversation with the head office of Diederichsen & Company here in Shanghai concerning the shipment of flour? A. Yes, sir.

Q. What was the result of that conversation—what was your statement to them about it? [180]

(Testimony of J. J. Connell.)

A. We told them we had fulfilled our contract and that we were not responsible for any delays and that the flour was for their account.

Q. Then there was a telegram sent on the 17th of April to you?

A. We did not know who the telegram was from; it was not signed. We presumed it might be from the steamer but we did not know and we communicated with the Shanghai office of Diederichsen & Company telling them we had a telegram from their agents up there at Chefoo we presumed but that the flour was there for their account not ours and afterwards we had the telegram repeated and found it was sent by Diederichsen & Company.

Q. But the matter was taken up with the Shanghai office of Diederichsen & Company?

A. Yes, sir; we had to telegraph through the local company here to find out.

Q. Did you ever authorize Diederichsen & Company to handle that flour for your account or on your account? A. No, sir.

Q. Did you ever know that Diederichsen & Company claimed to handle that flour for your account?

A. No, sir; not until I heard it here in court.

Q. Did Diederichsen & Company ever render you accounts of sales of this flour? A. No, sir; never.

Q. Did they notify you as to what they were doing with the flour? A. No, sir; never.

Q. They did not notify you they were selling it for your account? A. No, sir; never.

Q. And no such claim was ever made to you?

(Testimony of J. J. Connell.)

A. No such claim was ever made.

Q. During all this time, the fourteen years you have been in the flour business here in the Orient, you have been an [181] importer of flour from the Pacific Coast to China? A. Yes, sir.

Q. That is, your firm, Connell Brothers Company, has been? A. Yes, sir.

Q. And you are familiar with the time ordinarily required to make a direct shipment from the United States, the Pacific Coast, to North China?

A. Yes, sir.

Q. What is the time usually consumed in crossing from the Pacific Coast to North China?

A. From America, any where on the Pacific Coast, about six weeks we consider a quick trip.

Q. Vessels making this trip generally stop at Japan for coaling? A. Yes, sir.

Q. And six weeks is considered an ordinary quick trip?

A. Yes, sir; six weeks is an ordinary quick trip.

Q. Sometimes the trip is made in less time than six weeks?

A. Yes, sir; and sometimes it takes much longer.

Q. Now, Mr. Connell, will you state to the Court what rise or fall there was, if any, between the price of flour from the middle of October, 1911, to the 17th of April, 1912, in gold?

A. On the first of October the market price of flour was about \$4.07½ c. i. f. China delivery; \$4.07½ gold for four bags; from \$4.07½ to \$4.10 and on the 17th of April about \$4.37½—\$4.37½ on the 17th of April.

(Testimony of J. J. Connell.)

Q. There was an increase in the price?

A. Yes, sir; it increased from \$4.07½ in October, 1911, to about \$4.37½ in April, 1912, per barrel or four bags.

Q. Now, this increase from \$4.07½ to \$4.37½ gold per barrel or four bags, was that a stead increase?

A. Yes, sir. The market increased along somewhat gradually from \$4.07½ to \$4.10 to \$4.12 to \$4.15 until it reached \$4.37½ April 17, 1912. [182]

The COURT.—Q. Is that price in gold or taels?

WITNESS.—A. In gold; yes, sir.

Q. In the Chinese market or the home market?

A. That would be a price that could be quoted to the merchants in China for shipment from America.

Mr. FLEMING.—Q. That would be a c. i. f. price?

A. C. i. f. price; that would be the cost, insurance and freight to the Chinese ports.

Q. The price of flour moved from \$4.07½, \$4.10, \$4.11½ in October, 1911, to \$4.37 and \$4.37½ by the 17th or 18th of April—say about the middle of April?

A. Yes, sir; the prices advanced.

The COURT.—Q. The prices advanced in gold?

A. Yes, sir.

Mr. FLEMING.—Q. Do you know any of the causes for this advance in the price of flour?

A. During January there was quite a decline on account of the revolution breaking out along in November and December, 1911, in China, and the market prices of flour in China declined and in China the prices were quoted about 3.95 in January.

Q. And in February?

(Testimony of J. J. Connell.)

A. In February they advanced again.

Q. What was the price in October, along in the middle of October, 1911, in taels in Chefoo of flour, the market price?

The COURT.—Was this contract made in 1911?

Mr. FLEMING.—Yes, your Honor, it was made in October, 1911, and shipment to be made in February, 1912.

WITNESS.—A. In Shanghai in October taels 1.82½ to 1.87½ for one bag. One tael 82½ to one tael 87½. That is during October, 1911. [183]

Mr. FLEMING.—Q. What movement did the tael price take from October, 1911, through February, March and April, 1912—what was the general tendency? A. It was continually dropping.

Q. What was the reason for this decline in flour?

A. The revolution. There was a big revolution in China at that time. A great number of the more important native banks had closed and there was no movement of flour for the interior and silver continued to advance. The market of flour in China is usually governed by the price of silver to a very large extent.

Q. Along in October, 1911, what was the value of a gold dollar as compared with a Shanghai tael?

A. In October, 1911, one tael was gold 57¾ to 58 cents.

Q. And in April, 1912, what was the tael worth?

A. The tael was worth about 64½ cents and along the end of April it was a little more—65 gold cents.

Q. That increase in the price of silver decreased

(Testimony of J. J. Connell.)

the purchasing price of gold—was that a steady increase from October, 1911, to the middle of April, 1912? A. Yes, sir; it was.

Q. Now, with that steady increase in the price or value of silver, the tael price of flour declined?

A. Yes, sir; it has to follow the silver.

Q. Can you explain to the Court the reason for that?

A. A merchant buys flour to-day for shipment from America say at four gold dollars per barrel or four bags, delivery to China ports, with an exchange of to-day at 66 and the next week he buys at four gold dollars ten and exchange goes up to 67½ or 68 and he can undersell the merchant who bought at four gold dollars per barrel or four bags.

Q. It would require less silver to buy that amount of gold? [184]

A. Yes, sir.

Q. And therefore in making settlement for his shipment of flour it would cost him less silver to settle his gold contract?

A. Yes, sir; that is it exactly.

Q. And his flour would be sold in China on the silver basis?

A. Yes, sir; and it would take less silver for him to purchase a gold dollar and while he would be paying more gold for his shipment of flour when the silver is high he would pay much less silver and naturally he could sell his flour for less silver and realize a profit.

Q. Now, Mr. Connell, I show you a printed list and

(Testimony of J. J. Connell.)

ask you if this list does not show, or rather on that list if it is not shown and set forth in the first column the price of flour, the ruling price of flour, in gold from September, 1911, through to October, 1912? A. Yes, sir.

Q. And in the second column if you have not set forth there the rates of exchange covering the same period? A. Yes, sir.

Q. Did you compare those rates of exchange with the market price of exchange during the same period?

A. Yes, sir; from our own records in the office.

Q. As a merchant you receive daily reports as to the rate of exchange and the price of silver?

A. Yes, sir.

Q. You keep in touch as every other merchant does in Shanghai with the prevailing rates of exchange in the market here?

A. Yes, sir; we are notified five or six times a day and on some occasions maybe more.

Q. And those rates of exchange are corrected according to the market quotations? A. Yes, sir.

Q. In the third column what have you quoted—that is your quotation on the price of flour by the barrel? [185] A. Price per one bag.

Q. One bag of flour would be at the gold price set opposite it and at the rate of exchange set opposite to it? A. Yes, sir. We have it all set out here.

Q. And those calculations you say are correct?

A. Yes, sir. Approximately two cents covers the interest from America and the necessary expenses in-

(Testimony of J. J. Connell.)

curred for storage in go-downs in Shanghai or other ports.

Q. In the fourth column with the addition of two cents per bag gives the cost price of flour set down at their different dates and rates of exchange?

A. Yes, sir.

Q. In the last column have you not set down the ruling market price of flour on those particular dates?

A. Yes, sir; compiled from our own records.

Q. That would be the fifth column?

A. Yes, sir.

Q. I will ask you, Mr. Connell, if those prices for flour as set forth there represent correctly the market price of flour as shown on the list at those times?

A. Yes, sir; they are correct.

Q. As to the market price ruling on the dates set forth? A. Yes, sir; on the dates set forth.

Mr. FLEMING.—If your Honor please, we offer this calculation in evidence—table or statement—and ask that it be marked defendant's exhibit and call it a tabulated statement.

Mr. FESSENDEN.—As I understand, this tabulated statement is being offered in evidence on the part of defendants as giving the approximate market price in Shanghai of flour and the other data in connection therewith. I shall object to its being admitted in evidence to prove the market price of flour in Chefoo.

Mr. FLEMING.—Mr. Fessenden has already proved that by Mr. [186] Graeber, his own witness, your Honor. I know that I will have to prove

(Testimony of J. J. Connell.)

prevailing prices in China.

Mr. FESSENDEN.—I am prepared, your Honor, to have admitted in evidence this so-called tabulated statement offered by the defendant company limited to the extent that the market price of flour in Shanghai probably does effect to a certain extent the market price of flour in Chefoo, but the market price of flour in Chefoo would not necessarily be the same as the market price of flour in Shanghai. I deny that part of it and object to it.

The COURT.—I think that for the purposes for which this tabulated statement is offered in evidence it is entirely admissible. The effect, however, may be qualified. It does not necessarily follow that the market price of flour in Shanghai is the market price in Chefoo but Mr. Fleming realizes it and says he will cover it by subsequent evidence. This tabulated statement presumes to establish along with the testimony of this witness that the information furnished here so far as it relates to the market price in Chefoo is the market price in Shanghai. I don't understand that defendant is contending anything else for this tabulated statement than it shows what the market prices of flour in Shanghai was at certain dates and the rates of exchange prevailing on those dates set forth. The tabulated statement will be admitted in evidence.

(Marked and filed Defendant's Exhibit "A-1.")

Mr. FLEMING.—I will prove that later. Mr. Connell, how extensive is your business in the Orient, your flour business?

(Testimony of J. J. Connell.)

A. We have offices in Hongkong and Shanghai and the trade we had in 1912 during the six months of the new crop on the coast to August, 1912, we handled over two million bags of flour. [187]

Q. From August, 1911, to August, 1912?

A. Yes, sir.

Q. Two million bags of flour? A. Yes, sir.

Q. Does your business extend to Tientsin and Chefoo? A. Yes, sir.

Q. And south to Hongkong? A. Yes, sir.

Q. Where does Chefoo get its flour supply from?

A. From Shanghai and Hongkong exclusively. To my knowledge there was only two direct shipments made to Chefoo from America. One was made in 1912 and there was a small shipment made many years before. That is by direct steamer from the States to Chefoo.

Q. How much foreign flour does Chefoo consume?

A. During 1912 they had about four hundred and fifty thousand bags went to Chefoo, foreign flour. In that lot there was about from two hundred and fifty to two hundred and seventy thousand bags of flour went to Chefoo from Shanghai.

Q. Besides that shipment that was made to Diederichsen & Company where did the other flour that went to Chefoo come from—foreign flour, I mean?

A. From Shanghai and Hongkong. There might be a small lot that come from Japan, foreign flour.

Q. How is the market price of flour in Chefoo fixed?

A. It is usually fixed by the prevailing or ruling

(Testimony of J. J. Connell.)

prices in Hongkong or Shanghai at a price in Chefoo taels. It is about the same as if in Shanghai taels because the Chefoo tael is worth about $4\frac{1}{2}\%$ more than the Shanghai tael and that difference will pay the freight and shipping charges to Chefoo, and Shanghai and Hongkong have such facilities for shipping to Chefoo or use to get them so that they could receive orders for shipments right along. There are and were several steamers running into Chefoo from both Hongkong and Shanghai. [188]

Q. As the Chefoo tael is worth four or five per cent more than the Shanghai tael, that difference in price or value of the tael permitted merchants in Hongkong and Shanghai to quote dealers in Chefoo a price in Chefoo taels which protected them in expenses of shipping, insurance, etc.

A. Yes, sir. The difference in the price of a Chefoo tael and a Shanghai tael would cover all the charges for shipping and insurance.

Q. You kept in constant touch with the Chefoo market prices on flour, did you not? A. Yes, sir.

Q. And all of the China ports?

A. Yes, sir; we did.

Q. And you know the market price in Chefoo is the same as it is in Shanghai?

A. Yes, sir. The market price in Chefoo is controlled by the Shanghai and Hongkong market prices of flour because there are large stocks in these two ports and they supply the northern and southern markets. Hongkong and Shanghai are the distributing centers for China for the flour business.

(Testimony of J. J. Connell.)

Q. In the second column of this tabulated statement, Defendant's Exhibit "A-1" following the dates are quite a lot of figures "58, $57\frac{7}{8}$, 58, $57\frac{3}{4}$, $61\frac{3}{8}$ " and so on—that represents the amount of gold cents—

A. That one tael would buy.

Q. That one tael, Shanghai currency, would buy?

A. Yes, sir; on the date set opposite.

Q. The second column represents the cost price at that rate of exchange in taels?

A. Yes, sir; in Shanghai taels.

Q. And in the fifth column is added two per cent for interest and costs which are necessary, insurance in the go-down and storage in the go-down in Shanghai. [189]

Q. And the sixth or last column represents the market price at which flour was sold on those dates?

A. Yes, sir.

Q. I show you Plaintiffs' Exhibit "G." It represents a bought note contract by which the plaintiff purchased from the Russia-Asiatic Bank at Chefoo eighty-three thousand dollars in gold at exchange rate of 58. You recognize what that means or indicates?

A. Yes, sir; a contract made between the merchant and the bank in which the merchant agrees to take up that amount of gold at an exchange of 58 at any time before—

Q. From February to April?

A. Yes, sir; from February to April. In other words, it is buying that much gold.

Q. I will ask you if these contracts are not made

(Testimony of J. J. Connell.)

with the merchants, these contracts with the banks, by which you buy or sell gold?

A. Yes, sir; they are.

Q. It is an ordinary transaction of a merchant with a bank?

A. Yes, sir; it can be done and it can be taken up or cancelled. If the exchange goes up the merchant can go to the bank and pay the difference and have the contract cancelled and if exchange goes down he simply pays the bank the difference.

Q. A contract of that kind is not necessarily settled against any particular draft?

A. No, sir; it is not.

Q. It is the same as a man going to buy forward in a stock speculation? A. Yes, sir.

Q. It is a forward transaction on exchange?

A. Yes, sir.

Mr. FESSENDEN.—I object, your Honor, to Mr. Connell testifying as to what may have been done between Diederichsen & Company and the Russo-Asiatic Bank at Chefoo. If Mr. Fleming wants to know what Diederichsen could have done [190] with the Russo-Asiatic Bank about this exchange contract he should call someone from the Russo-Asiatic Bank to prove it. Mr. Connell did not make this contract with the Russo-Asiatic Bank. He can testify as to the customs of merchants in Shanghai relative as to what they do in relation to exchange contracts sometimes but as to his testifying regarding this particular exchange contract, I object on the grounds that it is incompetent, irrelevant, imma-

(Testimony of J. J. Connell.)

terial and a conclusion of the witness only or an opinion of his.

Mr. FLEMING.—I want to show that under the custom prevailing here Diederichsen & Company were not bound to settle exchange against this draft at the time of entering into the arrangement with the bank; that there is no such thing as fixing the basis of exchange at that time, and that he, Diederichsen & Company, could settle exchange at the time the draft arrived.

The COURT.—I will admit the evidence as it may have some bearing on this controversy. Objection overruled.

Mr. FESSENDEN.—Save an exception.

Mr. FLEMING.—Q. Mr. Connell, I show you Plaintiffs' Exhibit "G," which represents a purchase by Diederichsen & Company from the Russo-Asiatic Bank at Chefoo of gold eighty-three thousand dollars at exchange 58? A. Yes, sir.

Q. For delivery in—by the Russo-Asiatic Bank at Chefoo—February to April, 1912? A. Yes, sir.

Q. Under the custom prevailing here a merchant expecting a draft to be drawn on him in gold at some future date arranges with the bank to take up that draft through the bank at the rate of exchange prevailing on the date of purchase of the draft or the retirement of it? A. Yes, sir. [191]

Q. Is it necessary to have settled exchange against that draft at the time he makes arrangements with the bank for them to purchase it for him?

A. It is not; it is not customary to settle the ex-

(Testimony of J. J. Connell.)

change the day you open the credit with the bank or with the importer either, but they wait until the draft arrives and the merchant in the meantime uses his knowledge about the exchange market. The custom is, if it is a contract for goods to be supplied within four or five months, it is not customary to settle the exchange at the date of ordering the goods or arranging with the bank for the payment of the draft because the merchant figures that he will have between that date and the date the draft arrives for settling exchange and if the exchange goes up he can settle exchange at any time.

Q. What is meant by settling exchange?

A. By making a contract. It is a separate transaction with the bank entirely. You buy so much gold or you sell them so much silver. It is a separate transaction and has nothing to do with the other contracts you may make.

Q. It is permissible to do that with the banks as you have stated with reference to settling exchange at any time?

A. Yes, sir. You can get so much gold at the bank at any time under those arrangements and apply it to any transaction you may see fit. It is simply a question of arranging with the bank for the purchase of so much gold at any time to be settled for at the market price of gold in taels or silver at the time of purchase.

The COURT.—Q. Any date before the credit is made—any date before?

A. Yes, sir; after the draft has arrived. You

(Testimony of J. J. Connell.)

don't need to take it up on any particular draft; you can settle it whenever you want to or you can sell it back [192] to the bank; they will buy it back although they are losing on the transaction in buying the gold. This is done when there is no draft for goods to be taken up.

Mr. FLEMING.—Q. You can buy gold from the banks and sell it back to them again under arrangements similar to those to which you have testified—speculating? A. Yes, sir.

The COURT.—Q. You testified, Mr. Connell, that it is not customary for merchants to settle exchange with the banks as Diederichsen & Company did in this particular case. If a merchant was making contracts with distributors at the same time and desired to have the transaction concerning exchange settled so as to indicate profit or loss, it would not be unreasonable for them to actually buy the gold for their settlement with the importer as of that date if they were making contracts for the sale of the same product at the same time— isn't that quite probable?

A. Yes, sir; they could make settlement as you state but it is not the customary way for merchants to transact their exchange business out here.

Mr. FLEMING.—Q. That is a matter of discretion entirely with the merchant? A. Yes, sir.

Q. What is the custom of merchants in dealing with the banks out here after a draft arrives—it is drawn on the merchant through a bank but it is not taken up by the merchant at once, is it?

A. When the draft is due they are forced to take

(Testimony of J. J. Connell.)

it up usually and at the rate of exchange of that date. Unless other arrangements are made the bank usually demands the draft to be settled.

Q. Suppose you are not in a position financially to settle it?

Mr. FESSENDEN.—If your Honor please, I object to all this testimony regarding how drafts are settled in the banks of [193] Shanghai.

Mr. FLEMING.—I only want to prove, your Honor, that after a draft arrives in the ordinary manner to a bank with documents covering shipment of foreign goods attached to it that the merchant on whom this draft is drawn is not compelled to take that draft up at once but can take it up by settlement of same from time to time as he withdraws the shipment.

The COURT.—You mean he is not compelled by the bank to fix the exchange but may allow it to stand and select a day for settlement when the exchange is more favorable to him?

Mr. FLEMING.—Yes, your Honor, that is so. Is that so, Mr. Connell? A. Yes, sir.

The COURT.—Is that the regular way the banks have out here of dealing with their clients?

A. Yes, sir. The draft draws interest and the goods are stored in the go-downs in the name of the bank and the merchant cannot get possession of the goods until the draft is paid, but the merchant is permitted to pay off or to retire this draft from time to time as he draws the goods from the go-downs where they have been stored by the bank in the banks name

(Testimony of J. J. Connell.)

on the orders of the bank. If you pay off or retire a portion of the draft you settle for that portion of the draft at exchange of that day.

The COURT.—This is a little too indefinite it seems to me, Mr. Fleming. Your question to the witness brings forth an answer illustrating a custom that may be a custom with one patron of that particular bank but what we want is the custom of any bank. You know that banks differ in regard to their degree of liberality with which they extend credit and bank courtesies to their clients and what we should have [194] here is proof as to how the banks conduct this class of business as a fixed custom, not how they treat certain clients whom they may have had many transactions.

Mr. FLEMING.—If your Honor please, I want to show that Diederichsen & Company were not compelled to settle the exchange with the Russo-Asiatic Bank at the time they entered into the contract for flour with Connell Brothers Company or on the date of the arrival of the cargo in Chefoo.

The COURT.—But this is only the testimony of one witness by which you are attempting to prove it, a witness who presumably by his own testimony did not do any bank business in Chefoo as he did not have an office there.

Mr. FLEMING.—I am attempting to prove the custom in the Orient generally. This witness is a merchant who has been engaged in the importing business in the Orient for fourteen years as he has stated.

(Testimony of J. J. Connell.)

Mr. FESSENDEN.—If Mr. Fleming wants to prove a custom of the banks in relation to retiring drafts then I submit the bank itself is the only one who can state that custom positively. What Mr. Connell says may be true but many men have been ruined in business in the Orient by persuing the methods related by Mr. Connell in retiring drafts or in attempting to. It seems to me that Diederichsen & Co. adopted the only sound business method they could when after closing their contract with Connell Brothers Company they proceeded and settled exchange, and then knowing they would have to pay they entered into contracts for the sale of the same cargo at fixed tael prices.

The COURT.—It seems to me the only extent to which Mr. Connell can go in his testimony is to relating his experiences in dealing with the banks. If the Court should receive [195] testimony along such lines it would not be justified in accepting it as fixing the habit and custom of business of all of these different banks here in the East, especially banks outside of Shanghai and especially where the testimony relates to Shanghai banks with whom he has dealt. That general custom, I think, Mr. Fleming, you will have to establish by a different line of testimony than this.

Mr. FLEMING.—I will have to prove it by individual witnesses, but this witness knows as much about it as anybody else.

The COURT.—I presume Mr. Connell would not attempt to say how all the different banks in Shang-

(Testimony of J. J. Connell.)

hai treat that proposition. The witness has related his experiences.

Mr. FLEMING.—I want to show, your Honor, that Diederichsen & Company could have settled that draft the date the draft arrived in Chefoo and they could have settled it from time to time as they made sales of the flour.

The COURT.—You cannot prove that by this witness. You are trying to prove it by asking this witness what his knowledge is in regard to the matter.

Mr. FLEMING.—I think Mr. Graeber has himself practically admitted that the contract he had with the bank did not require him to settle it immediately, to settle exchange with the bank on the date of the contract with the bank. Does the Court hold that I cannot prove that custom?

The COURT.—No, but the testimony you have offered and are attempting to offer through this witness does not seem to me to be proof of that fact, proof of the custom. You have got in the testimony Mr. Connell's statement as to what he has experienced about the custom.

Mr. FESSENDEN.—I am willing to admit that Mr. Greaber testified that he was not compelled, as Mr. Fleming says, to settle exchange on the date he established his credit [196] with the Russo-Asiatic Bank. In Mr. Greaber's testimony, on page 22 thereof, this question was asked him:

“Q. Can you explain why you did settle exchange against that draft? A. Yes, sir.

Q. Was it necessary to settle exchange in this deal?

(Testimony of J. J. Connell.)

A. Yes, sir. We had to guarantee to the Chinese 1.83 and something per sack in order to get their business as they were not willing to gamble on the exchange.

Q. The draft drawn by Connell Brothers & Company on you was in gold? A. Yes, sir.

Q. And you settled with your bankers for this eighty-three thousand dollars gold in taels at a fixed rate of exchange of 58 against that draft?

A. Yes, sir.

Q. If you did not settle on the rate of exchange how would your draft be retired?

A. At the rate of exchange of the day. It was better in this case as exchange went up.

Q. Your draft would be retired on the rate of exchange prevailing on the day it fell due?

A. Yes, sir."

The COURT.—Isn't that your whole point, Mr. Fleming? So that it really comes down to a question of law, he electing to take that course as to whether that has any effect in law as to the amount of damages he may have suffered by that act.

Mr. FLEMING.—I want to show that if Diederichsen & Company had not settled exchange until they had made these sales of flour there would have been but little if any loss. I want to show that they could have settled exchange as they made these sales of flour and thereby sustained no loss.

The COURT.—Subsequent to the delivery of the flour?

Mr. FLEMING.—Yes, your Honor. They paid

(Testimony of J. J. Connell.)

on the draft or retired the draft as they made sales of flour from time to [197] time after April 17th. As they made sales they retired their draft held by the Russo-Asiatic Bank at Chefoo.

The COURT.—Did Mr. Greaber testify to that here?

Mr. FLEMING.—Yes, your Honor, he has already *stated testified* to that. In his cross-examination at the bottom of page 25:

“Q. But you were at liberty to settle that exchange if you wished at the time the ship arrived with the cargo—it was simply a matter of judgment with you at the time? A. Yes, sir.

Mr. FESSENDEN.—Everybody admits that, Mr. Fleming.

Mr. FLEMING.—If you admit he could have settled this draft and exchange thereon from time to time as he made these sales of flour I will stop right here on that line of testimony.

Mr. FESSENDEN.—No; I don't admit he could for he had made an exchange contract with the bank and he would be responsible to the bank for the difference. There was a difference in favor of the bank by reason of the difference in exchange from the contract price and what it was when sales of flour were being made and he was responsible for that difference.

Mr. FLEMING.—Diederichsen & Company settled or retired this draft at exchange 58, but if they had not taken out this exchange contract they could have settled or retired their draft as sales of flour

(Testimony of J. J. Connell.)

were made at the rate of exchange of the day.

The COURT.—It seems you have now got down to a point in law respecting which you cannot agree, Diederichsen & Company having proceeded in that way what effect, if any, does it have on the issue now being tried in this case.

Mr. FLEMING.—I will not pursue that line of questioning any further particularly in view of the fact that Mr. Fessenden says Diederichsen & Company could have settled exchange [198] on the date the cargo of flour arrived in Chefoo.

Mr. FLEMING.—If your Honor please, with the consent of Mr. Fessenden, I would like to withdraw Mr. Connell for the time being and place Dr. Reid on the witness-stand as he is anxious to get away.

Mr. FESSENDEN.—No objections, your Honor.

The COURT.—Then you may proceed and call Dr. Reid.

[Testimony of Dr. Gilbert Reid, for Defendants.]

GILBERT REID, called and sworn as a witness on behalf of the defendants.

Mr. FLEMING.—Q. Dr. Reid, I show you Plaintiffs' Exhibit "C," which purports to be a contract written in the Chinese language for the sale of seventy thousand bags of flour to certain Chinese. I first will ask you, however, whether you are familiar with the Chinese language?

A. I am fairly familiar with it; yes, sir.

Q. How long, Doctor, have you had knowledge of the Chinese language?

A. About twenty-eight years.

(Testimony of Dr. Gilbert Reid.)

Q. You speak the language and write it, do you not?

A. I speak the language. I don't generally write it.

Q. You read it? A. Yes, sir, I read it.

Q. During that period of time, twenty-eight years, has your use of the Chinese language been extensive—you are a student of Chinese?

A. I would say it was fairly extensive; not as great as some.

Q. You understand fairly well Chinese writings?

A. No, sir; written in the order of their style, then, it would be impossible for me to read it but the ordinary writing would not be in such style.

Q. You understand the ordinary writing of Chinese? A. Yes, sir.

Q. I show you Plaintiffs' Exhibit "C" purporting to be a contract [199] in Chinese language with a certain Chinese firm of Chefoo for the sale and purchase of flour and I ask you to examine the characters in that contract which speak or refer to the time of delivery—do you find them?

A. Yes, sir.

Q. What is your interpretation of that contract in regard to the time of delivery?

A. It says if it is in 1912, the third month within or without, or literal translation within or without. The other character "or" is inside.

Q. That would be March, 1912?

A. Yes, sir. It gives the foreign year and I suppose it refers to the foreign month but not what we

(Testimony of Dr. Gilbert Reid.)

call the Chinese moon.

Q. Under that contract would a delivery made in April be within its terms?

A. Well, I don't know. I don't think there is any objection because it says within and without. This period of three moons there is no memorandum with reference to it—within the third month or without the third month.

Q. So there is no limit?

A. There is no limit in that one expression. Towards the end of the contract there is a statement that if at the fixed time the goods or the quality not satisfactory such and such things will happen seeming to interpret there was a fixed time but the other expression why it has—there is no limit about it.

Q. March is not fixed as the time of delivery under this contract? A. Not as I understand it.

Q. And you do understand the Chinese characters there?

A. Yes, sir; except when he fixes time because there they want either the exact quality of goods according to contract.

Q. You don't take it that that refers to March, do you?

A. Not in the one expression; no, sir.

Mr. FLEMING.—Take the witness. [200]

Cross-examination.

Mr. FESSENDEN.—Q. Dr. Reid, do you think that the Chinese would use that expression intending it should not refer to a time when the goods were to be delivered?

(Testimony of Dr. Gilbert Reid.)

A. There is no limit about it. It would be a fair interpretation to say they extended it over the third month or they would not have put in there the third month, but they would have put there a few days grace as we would do. It could not go on indefinitely or they would not mention the three months.

Mr. FESSENDEN.—That is all.

Redirect Examination.

Mr. FLEMING.—Q. These days of grace they could extend for several weeks?

A. I should think there was no objection to several weeks but not months. If they were going to say several months they would use this other expression.

Mr. FLEMING.—That is all.

Recross-examination.

Mr. FESSENDEN.—Q. If it meant more than three months you would say that that character being outside refers to days or weeks?

A. Well, I should think naturally from the Chinese expression it refers to days, the third month or more like days of grace.

Mr. FLEMING.—Q. You take it under that contract that any time during the succeeding month would be within the fixed time?

A. I would not think that the ordinary Chinese reading would fix it for several months for they mention the third month.

Q. Within a month would you say?

A. I think within a month would be somewhere near it.

(Testimony of J. J. Connell.)

Mr. FLEMING.—That is all.

Mr. FESSENDEN.—That is all. [201]

[Testimony of J. J. Connell, for Defendant (Recalled).]

J. J. CONNELL resumes witness-stand.

Mr. FLEMING.—Q. This brand of flour, Mr. Connell, known as and called “Morjon,” how extensively is it known in China?

A. It is sold all over China in very large quantities.

Q. Is it a new brand or an old brand of flour?

A. It is a very well-known brand.

Q. About what quantity of that “Morjon” flour is sold in proportion to other brands of flour of similar quality in China?

A. There is more “Morjon” sold than any other brand in China and during 1912 there was more sold than ever.

Q. Now, in selling flour in the Orient is it customary for the importers to guarantee delivery?

A. No, sir; it is not.

Q. It is not customary for importers to guarantee delivery? A. No, sir.

Mr. FESSENDEN.—We object to that, your Honor, on the grounds that such inquiry is without the present issue involved in this action.

The COURT.—Objection sustained as I do not see what bearing it has on this issue.

Mr. FLEMING.—Save an exception.

Mr. FLEMING.—Q. Mr. Connell, in this tabulated statement marked Defendant’s Exhibit “1-A,”

(Testimony of J. J. Connell.)

the market prices you set forth in the fifth column, the last column, between the first of March and the end of April, 1912, you show a decline between the first of March and the end of April in a cent and a half tael per bag?

A. Yes, sir. These prices are for large quantities.

Q. The prices set forth in the tabulated statement are prices for large quantities on one order? [202]

A. Yes, sir; from twenty to twenty-five or fifty thousand bags.

Q. And in smaller quantities?

A. There would be a difference of from two to three cents more per bag.

Q. Between the first of April and the end of April the price of flour remained at 1.62½ per bag for large quantities? A. Yes, sir.

Q. And for smaller quantities it would be?

A. From two to three cents more per bag. These prices are for the standard export brands of flour.

Q. So that between early in March to the end of April, 1912, there was but a very slight difference in the price of flour?

A. The first of March it was 1.64; about the middle of March 1.63 and the end of March about 1.62½ and that price remained until the end of April when it fell to about 1.61. The first of May 1.61, may be 1.59.

Mr. FLEMING.—Take the witness.

Cross-examination.

Mr. FESSENDEN.—Q. These prices are all fixed on the same freight rates?

(Testimony of J. J. Connell.)

A. Yes, sir; they are based on c. i. f. prices.

Q. C. I. F. prices, cost, insurance and freight. From September 2, 1911, down to October 15, 1912, those figures are all based on the same freight rates?

A. They are calculated on the standard freight rate.

Q. Freight rates change every now and then, don't they? A. Sometimes they do but not often.

Q. Sometimes they are a great deal higher than other times?

A. No, sir; fifty or sixty cents per ton higher; sixty cents to one dollar per ton, not more.

Q. Do you sell flour in tael prices?

A. We don't usually sell in tael prices; we sell in gold.

Q. Do you ever sell flour in tael prices? [203]

A. I don't remember of selling in tael prices in a number of years. It is not customary to sell to merchants in tael prices.

Q. If you sold in tael prices they would have to fix the exchange?

A. Not necessarily. We fix the exchange on the date of payment of the draft or at the time the draft is presented for payment.

Q. And you limit your offer as long as exchange holds good, not longer?

A. Not usually. You exercise your own judgment about it.

Q. If you make a sale of flour at taels 1.72 on exchange at 60 if exchange goes down or up you act accordingly?

(Testimony of J. J. Connell.)

A. You mean for future shipment?

Q. Yes, sir; for future shipment?

A. We don't sell in tael prices; we always sell in gold.

Q. Well, suppose you were selling on a tael basis?

A. I would have to use my own judgment as to the rate of exchange.

Q. Then your business would be a speculative one?

A. If you sold to a merchant that is considered quite good and after the arrival of the goods you found the Chinese merchants could not take up their goods or they refused them for any cause whatever, you would naturally have to do the best you could with the goods.

Q. I want to ask you, Mr. Connell, if you do not fix your exchange at the time of making your contract for goods and sell to others at a tael price you would have to take the chances on exchange going up or down and you would then be taking the chances of losing money, would you not?

A. Yes, sir.

Q. Without settling exchange you could not tell one month ahead how you would come out, could you? [204]

A. You could get quotations for a year ahead if you liked.

Q. Do you guarantee those quotations?

A. They vary all the time.

Q. Would you guarantee them for three months ahead?

A. We could not guarantee anything; we would

(Testimony of J. J. Connell.)

have to use our own judgment like on the prices of flour.

Q. If you got an order for one hundred thousand sacks of flour to-day you would have to go and fix your exchange?

A. No, sir. I would have to use my own judgment.

Q. The profit on flour per sack to the importer is small—a cent a sack or something of that kind?

A. It is a close margin—two per cent.

Q. And the variation of a few cents in exchange would eat that up?

A. Yes, sir. You have to use your own judgment. If you buy flour you buy it when the market is low, so that when selling it you have a larger margin of profit on the original price to work on. If you buy exchange thinking to protect yourself, you have to take all those things into consideration—whether you think exchange is going up higher or will fall lower. Every year the exchange varies about twenty per cent but it continued to go up all the year from the time of this Diederichsen & Company contract; it was very low just before then.

Q. I understand all that; I am perfectly familiar with that. Wouldn't it be best for you to sell eighty thousand sacks of flour with a fixed rate in taels than to sell the same quantity without an understanding as to exchange?

A. I wouldn't sell it in taels. I would sell in gold only.

Q. Suppose the customer would not buy any other way?

(Testimony of J. J. Connell.)

A. Then I would use my judgment as to settling exchange; I do [205] not say that I would buy exchange. It is like buying shares when you buy exchange, you gamble whether it is going up or down, you buy futures.

Q. These prices made here in this tabulated statement marked Defendant's Exhibit "1-A" are based on one freight rate, you stated?

A. The freight rates at those times were three and a half to four dollars gold per ton.

Q. These figures on this tabulated statement do not represent actual sales?

A. They are taken from my books.

Q. Do they represent actual sales or merely sort of statistics making up these sheets?

A. Sales. It is taken from my books. Those are the market prices and data from my books.

Q. I want to know if the figures set forth on this tabulated statement, Defendant's Exhibit "1-A," running from September, 1911, down to October 1911, if they are all based on actual sales?

A. They were actual sales.

Q. You say they were? A. Yes, sir.

Q. They all represent actual sales?

A. Yes, sir; and the quotations were made for large quantities; those are all for large quantities; two or three cents more per bag if for small lots.

Q. Do you maintain that the prices of flour in Shanghai absolutely fixes and controls the prices of flour in Chefoo?

A. Hongkong and Shanghai absolutely fixes it.

(Testimony of J. J. Connell.)

Q. You say that the price of "Morjon" flour to-day in Shanghai is the same as it is in Chefoo?

A. If we had stocks of "Morjon" here and there was a stock in Hongkong the prices would be the same. If there is a cent or two per bag to be made in Chefoo they will bring them from Hongkong or Shanghai. They can get them in three or four days.
[206]

Q. What effect does the bringing in of the native wheat crop to Chefoo have on the market for foreign flour up there?

A. The prices are made easier as a rule.

Q. The Chefoo flour market is a large flour market, is it not?

A. Yes, sir; the Chefoo market consumes nearly as much as the Shanghai market.

Q. How much larger is the Shanghai flour market than the Chefoo flour market?

A. In 1912 the Shanghai market took a large quantity of flour but a great deal of it was for distribution in other ports than Shanghai.

Q. Approximately how much would you say?

A. About two million bags.

Q. And I understand the Chefoo market took how much?

A. Chefoo took about seven hundred and fifty thousand bags; four hundred and fifty thousand bags of that was foreign.

Q. The amount of foreign flour sent to Chefoo was about four hundred and fifty thousand bags or sacks?

A. Yes, sir.

(Testimony of J. J. Connell.)

Q. Now, you say that Shanghai takes two million sacks of flour yearly?

A. Yes, sir; ordinary years but not that year.

Q. Then you cannot say the Chefoo market is any where near in size like the Shanghai flour market?

A. That particular year Shanghai had more flour in stock here than ever before.

Q. The difference between four hundred and fifty thousand and two million is enormous?

A. Shanghai is a great distributing port you must remember.

Q. You stated a moment ago that Chefoo took practically as much flour as Shanghai?

A. You misunderstood me. I said Chefoo consumed practically as much flour as Shanghai.

Q. Well, maybe I did—

A. Shanghai is a distributing port for distributing to all [207] the ports in China. In Chefoo they do not distribute. In old times they use to. They used to import about eight hundred thousand to a million bags of flour; that is many years ago; but of late years they do not import so much.

Q. In later years how much flour approximately would they import? A. Half a million bags.

Q. Eighty thousand sacks of foreign flour in Chefoo market is a large shipment?

A. It is not large when you consider Chefoo uses seven hundred thousand sacks in a year.

Q. You ship flour regularly from Shanghai to Chefoo?

A. No, sir; it is usually shipped by the Chinese.

(Testimony of J. J. Connell.)

We have shipped flour to Chefoo from Shanghai.

Q. In what quantities?

A. From five to ten thousand bags. There are several steamers leaving Shanghai during each week that put into Chefoo and some that run there directly—all of them carry cargo.

Q. Eighty thousand sacks of flour in one shipment from Shanghai to Chefoo you would call a large shipment?

A. Yes, sir; on one steamer it would be but it would not be a large amount for one week or one month.

Q. But eighty thousand sacks of flour arriving on one steamer at Chefoo for one firm if exchange was unfavorable to the firm selling would be a large quantity to dispose of in Chefoo, wouldn't it—it would depress the market all the more and make quite a difference?

A. I would not think it would make so much difference.

Q. Wouldn't it, in your opinion—you are a merchant and are quite familiar with how these matters operate on markets. Wouldn't a shipment of eighty thousand sacks of flour arriving in Chefoo at the time of an unfavorable exchange [208] market, assuming that the exchange market was unfavorable to the firm handling the flour at the time of the arrival of the shipment, wouldn't that affect the flour market very considerable?

A. Well, considering that Chefoo imports about eighty thousand bags of flour a month, it should not

(Testimony of J. J. Connell.)

affect the market very much, because eighty thousand bags of flour is not a large shipment. It is a fair shipment for Chefoo coming in on one steamer.

Q. You mean to tell me that eighty thousand sacks of flour arriving in Chefoo in one shipment out of a total of about five hundred thousand sacks of foreign flour used in that market yearly would not affect and depreciate the market price of flour if thrown on that market there?

A. The consumption of foreign flour in Chefoo is probably less than five hundred thousand bags. They use about four hundred and fifty thousand bags of flour a year there and divide that by twelve and you have it—thirty-five or forty thousand bags per month. That was the amount for Chefoo in 1912.

Q. Have you any market prices of flour for Chefoo—Chefoo flour market prices?

A. We are in constant touch with the Chefoo flour market and the prices prevailing there through our compradore department.

Q. Chefoo flour market quotations?

A. Yes, sir.

Q. How does it become known in Shanghai—do they issue flour market reports at Chefoo?

A. Not that I know. I presume it gets out from the merchants in Chefoo who are dealers in flour. They probably have connections here in Shanghai and report the prices to certain merchants here in Shanghai. [209]

Q. You have no information as to the market prices prevailing in Chefoo from October, 1911,

(Testimony of J. J. Connell.)

down to say August, 1912?

A. We kept in touch with the market in Chefoo all the time.

Q. Have you yourself any personal knowledge regarding the prices of flour prevailing in Chefoo during the dates I mention?

A. Yes, sir; we have two men there who report to us the condition of the market for flour and the prevailing prices there and our compradore department have their men who keep them informed also.

Q. Have you any records bearing on the prices of foreign flour in Chefoo during the period I have just mentioned?

A. We have quotations from foreigners, foreign firms, in Chefoo who are firms that deal in flour there.

Q. Can you produce them in court?

A. I think so.

Q. You say you get your quotations of flour prices in Chefoo through your compradore department here in Shanghai?

A. Yes, sir; and we also have foreigners there who report to us the flour market conditions in Chefoo.

Q. What foreigners do you refer to?

A. Taylor and Company of Chefoo.

Q. There are no regular market reports published in Chefoo? A. No, sir.

Q. Now, I understood you to say, Mr. Connell, referring to this telegram—you got this telegram on April 8th?

A. (After looking at telegram.) Yes, sir.

Q. And you understood exactly what it referred

(Testimony of J. J. Connell.)

to? A. Yes, sir.

Q. And prior to April 8th you had received several telegrams from Diederichsen & Company referring to this shipment of flour?

A. I don't think we had any telegrams but I believe we heard from them in regard to it.

Q. Did you receive this telegram from them on the 17th of [210] April, 1912, referring to this cargo of flour?

A. (After examining telegram.) Yes, sir.

Q. You say when you received this telegram you did not know from whom it came?

A. No, sir; not for certain. We thought it might be from the steamer. We had it repeated and found out it was from Diederichsen & Company.

Q. You ascertained that fact by having the telegram repeated?

A. Yes, sir. I think we ascertained on the 19th who it was from and in the meantime we saw Diederichsen & Company here in Shanghai. I called on them as soon as I got the telegram because I thought it might be from their Chefoo branch or office.

Q. You knew it was from Diederichsen & Company's Chefoo office when you called on their Shanghai office? A. No, sir; we did not.

Q. Did Diederichsen & Company in Shanghai know it was from their Chefoo branch office?

A. No, sir; they did not.

Q. After you ascertained this telegram was from Diederichsen & Company of Chefoo what did you do?

A. I saw Diederichsen & Company here in Shang-

(Testimony of William H. Birtt.

hai, thinking we might discuss it, and I told them in their office that we considered that we had fulfilled our contract and refused to have anything more to do with it and the interview dropped off there and I left their office.

Q. You say the conversation dropped off there after you had stated you considered you had fulfilled your contract and refused to have anything more to do with it?

A. Yes, sir; and that it was their flour; that we had fulfilled our contract; they had authorized us to ship the flour through a credit they had opened up during February and March and we had complied with our agreement. [211]

Q. You don't think you made a breach of contract?

A. No, sir; not according to our contract.

Q. And you washed your hands clean of it?

A. We declined to have anything to do with it.

Q. And after that it was brought to your attention in the nature of this law suit?

A. Yes, sir. We did not hear anything about it until we were brought into court. They never informed us as to what they were doing with the flour.

Q. You had already washed your hands clean of it. You told Diederichsen & Company in Shanghai you would not have anything further to do with it?

A. Yes, sir; we did.

Mr. FESSENDEN.—That is all.

Mr. FLEMING.—That is all.

[Testimony of William H. Birtt, for Defendant.]

WILLIAM H. BIRTT, called as a witness on behalf of defendant and sworn.

Mr. FLEMING.—Q. Give your name, Mr. Birtt, please.

A. William H. Birtt.

Q. Mr. Birtt, what is your business or occupation?

A. I am the General Oriental representative of the Centennial Mill Company and its products.

Q. What is the business of the Centennial Mill Company?

A. Manufacturing flour and cereals.

Q. How long have you been acting in the capacity of General Representative of the Centennial Mill Company in the Orient? A. About ten years.

Q. How extensive is the business of the Centennial Mill Company?

A. Many million bags of flour a year.

Q. The Centennial Mill Company are shippers of flour to the Orient? A. Yes, sir.

Q. Mr. Birtt, in your capacity as General Representative of [212] the Centennial Mill Company are you familiar with the methods of shipping flour and the time consumed in making deliveries to the Orient? A. I am.

Q. What is the ordinary length of time consumed—what is the ordinary time it takes to make the passage across the Pacific Ocean from the Pacific Coast to China?

A. It depends largely on the steamer and the weather conditions. A fast steamer with favorable

(Testimony of William H. Birtt.)

weather will make it in six weeks and a slow steamer under the same conditions eight weeks. We loaded one steamer that consumed eighty days in reaching Hongkong and another one forty-five days from Seattle to Yokohama. That all depends on the steamer and the weather conditions. The time is lowered, of course, according to the rate the steamer can travel and the weather she encounters on the trip across.

Q. Are you familiar with the flour market prices in China? A. Yes, sir.

Q. Have you in your business in the Orient to keep in touch with this flour market out here?

A. Yes, sir: it is our business to know the situation of the flour market here, the contemplated amount required, what is on hand in the several Chinese ports and the prevailing market prices as near as we can get them.

Q. Are you familiar with the flour market as it existed in October, 1911, down to say along in the middle of May, 1912? A. Yes, sir.

Q. Were you in the Orient, Mr. Birtt, during that period of time? A. I was.

Q. I will ask you, Mr. Birtt, whether there was any considerable decline in the price of flour between October, 1911, foreign flour in Chefoo, to April, 1912?

A. Yes, sir; there was throughout all the ports through China, [213] from Manila through China and as far north as Vladivostock.

Q. You also represent your company in the Philippine Islands? A. Yes, sir.

(Testimony of William H. Birtt.)

Q. When did the chief decline in the price of flour take place within the dates I mentioned—between what time did this chief decline in flour take place?

A. It started to decline in November, 1911. In fact along early in November, 1911, there was a meeting and a dinner given by some very prominent and influential Chinese merchants here in Shanghai and I was invited to it, and at the dinner they asked me to cancel their contracts for flour and stated as a reason that it was on account of the revolution breaking out at Hankow and they feared a complete upset in their business. I told them I could not do this as we, referring to the Centennial Mill Company, had no direct dealings with the Chinese merchants.

Q. The price of flour was declining at this time?

A. It had began to decline about October, the latter part of October, and it continued to decline from 1.85 per bag until along in April, 1912, it reached 1.67. I am reciting the ordinary market conditions here in Shanghai as they were prevailing then—about from 1.85 in the latter part of October, 1911, to 1.67 in the middle of April, 1912. There had been extensive buying of flour here in China just before or at the breaking out of the revolution. I sold probably over one million bags of flour in October for shipment after January first and the market began to decline at the end of November and continued on down to April and in April, say, from the first of March until the latter part of April the market was weak, the stock on hand large and few buyers and those who had sold flour on [214] credit insisting

(Testimony of William H. Birtt.)

on payment of their accounts and these conditions forced the flour market down badly and the Chinese flour merchants suffered badly. Some of the foreign merchants had to be depended upon by the Chinese flour merchants to carry them along. The merchants lost heavily throughout China during that period of time.

Mr. FESSENDEN.—If your Honor please, I think if Mr. Birtt would answer the questions put to him we would find it much better and easier to follow him.

Mr. FLEMING.—Q. What was the effect of all this, Mr. Birtt, upon the general flour markets throughout China?

A. It was very depressing indeed and lowered the prices of flour very materially. I had sold some flour to a patron of mine here in Shanghai and he was over a year trying to market that flour and he was not able to market it himself so I marketed it myself to save our company.

Q. Between October, 1911, and the first of March, 1912, how much of a decline in the local price in tael was there in flour?

A. About as I say—in October it was about 1.85 and dropped in November to 1.77 and then it dropped down to 1.64 and 1.65 right up to the end of April.

Q. Between the early part of March, 1912, and the end of April, 1912, was there much fluctuation in the price of flour in China? A. No, sir; not here.

Q. Was there much decline in the price of flour?

(Testimony of William H. Birtt.)

A. No; except as I have recited to the Court—one cent and one cent and a half which was due to the conditions I have already related. If a draft was out at the bank and the bank was insisting on the party on whom it was drawn making good, insisting on its payment, the foreigner would worry the Chinese to make good their payments due to him and the Chinese would rush out and offer the flour at one or two [215] cents under the market and that would bring it back to its lower level again. The Chinese were falling all over themselves, all over one another, to dispose of their holdings.

Q. Between the first of April and the end of April, 1912, the price of flour was about 1.64 and 1.65 per bag?

A. Yes, sir; that was the market price; on large lots it would be about two or three cents lower; say probably three cents lower on large lots. I know that at one time I was disposing of wholesale flour and I was offered three cents per bag below what other people were doing business on in Shanghai and there this chap was—Mr. Connell was getting three cents above the price I was offered by the other client. Two days later I sold the same lot for a higher price.

Q. What was the cause of this decline in flour in the latter part of October, 1911, down to May first, 1912?

A. It was caused by various conditions arising. The disturbances caused by the breaking out of the revolution was the main factor; the Chinese had

(Testimony of William H. Birtt.)

bought very heavily and on account of internal troubles and conditions their credit was impaired; they had bought more heavily in flour than they had any year since 1907; there stock was coming forward and they were storing it on account of the trouble in the interior of China; these stocks of flour were coming directly out to China; the Chinese banks were failing and the Chinese merchants were having trouble financing their business, and were obliged to sell their flour at reduced prices in order to meet imperative demands from foreigners who could not finance them and thus the market was destroyed. I should have stated also that the merchants could not ship their stores in the go-downs here to markets at other ports. [216] As I have just recited to the Court, the Chinese buyers waited upon me and wanted to be allowed to cancel certain contracts they had made with foreigners here for the delivery of flour, and I had to tell them that that was a matter with which I had nothing to do. I explained to them that we sold only to certain patrons or foreign merchants and named Connell Brothers, China & Japan Trading Company, Mustard & Company and many others, and had nothing whatever to do with the Chinese merchants in the line of selling flour to him or his company.

Q. This decline in the price of flour started in November, 1911, and it dropped from 1.85 taels then to 1.65 taels by the first of March, 1912?

A. Yes, sir.

Q. And remained at about 1.65 up to April?

(Testimony of William H. Birtt.)

A. Right up to the end of April. It probably fluctuated from 1.63 to 1.65.

Q. Did exchange have anything to do with this?

A. It certainly did. It is a great factor.

Q. Then among the numerous causes you have stated that went towards causing a drop in the price of flour you would also mention the rise in exchange?

A. Much of the depression in the price of flour was caused by the exchange. For instance, many buyers or some buyers would not settle exchange and the buyer who would not settle his exchange he was in a position to undersell the buyer who had settled his exchange and there was big commissions made. Those that had settled exchange, those who were foolish enough to settle their exchange, met with disaster while those who did not settle exchange made a fine commission. It was the same with all those who did not settle exchange. I recite to the Court there was a client of mine who had purchased one hundred and seventy-six thousand bags of flour and when the flour [217] arrived in China he was not in a position to take delivery. He had made settlement with the bank on exchange to cover the cost of this cargo but he was not able to retire his draft and I took the flour back but I did not take the draft in the hands of the bank. I took this cargo of flour and marketed the flour without loss because the high rate of exchange saved him on the price he had paid for it which was 4.12½ gold per four sacks. I know this client stood to lose over twenty thousand taels on this shipment alone. There was

(Testimony of William H. Birtt.)

over two hundred thousand taels lost here in Shanghai alone on flour at that time.

Q. Was this loss of two hundred thousand taels in Shanghai on flour caused by having settled exchange?

A. Some portion of it was and some *portion it had* not been settled, but was caused from other disastrous factors entering into the general conditions then existing here.

Q. On a portion of these shipments of flour the exchange had not been settled and consequently the merchant got a much higher price for silver in retiring his draft?

A. Yes, sir; which would give him a big margin of profit over those who had settled exchange.

Q. And that equalizes the matter and you can sell the flour and market it without loss—generally with a profit? A. Yes, sir; that is it exactly.

Q. In the case you recited just now, if the consignee of the flour had settled the exchange at the time he made his contract he would have suffered a loss?

A. He would have suffered a loss of twenty thousand taels but as it was he came out whole, at least he suffered no loss.

Q. During this period of time to which we have been referring was there any increase or decrease in the gold price of flour?

A. Yes, sir; there was. There was an increase [218] in the gold price of flour from October, 1911, up to the end of April, 1912. Along in December,

(Testimony of William H. Birtt.)

1911, prices declined slowly somewhat but recovered themselves but that is due to American wheat fluctuations.

Q. I show you a tabulated statement, Mr. Birtt, marked Defendant's Exhibit "1-A" and ask you if the prices set forth in the last columns in taels on the respective dates correspond with your knowledge of the market prices of flour prevailing for sales in large quantities at those times?

A. Yes, sir; to the best of my knowledge.

Mr. FESSENDEN.—Q. Have you read them over, Mr. Birtt?

A. I have looked over them referring to the months called for.

Mr. FLEMING.—Q. And in the middle list you put it at a cent or two higher? A. Yes, sir.

Q. That is why you have got 1.62 and 1.64?

A. Yes, sir; that is it.

Q. Mr. Birtt, you are familiar with the flour market through China? A. Yes, sir; I am.

Q. And you are familiar with the market conditions in China? A. Yes, sir.

Q. Have you ever visited Chefoo?

A. I have many times.

Q. And have kept in touch with the flour market conditions obtaining there? A. Yes, sir.

Q. How is the flour market of Chefoo governed or controlled as to prices of flour prevailing there from time to time?

A. By the flour market of Shanghai and Hong-kong just the same as the Chicago wheat market

(Testimony of William H. Birtt.)

governs the Seattle wheat market. In fact, I have visited the shops many times in Chefoo when I have been there.

Q. Is there any direct shipments of as much as eighty thousand sacks of foreign flour going into Chefoo?

A. The only one I can remember of is a shipment made six or eight years ago when there was a small shipment of fifty [219] thousand bags of flour went to Chefoo direct. Since that time I sold one lot of fifty thousand bags of flour to a Chinese merchant at Chefoo which was transshipped, and another lot of thirty-five thousand bags which was also transshipped to Chefoo. There are no other direct shipments of any quantity of flour made to Chefoo that I know anything about excepting this shipment of eighty thousand bags to Diederichsen & Company.

Q. Mr. Birtt, you are in a position to say definitely that the flour market in Chefoo is fixed in so far as prices are concerned by Shanghai and Hongkong?

A. Yes, sir.

Q. As to the flour market throughout China, is it fixed by the market prices in Shanghai and Hongkong?

A. The northern market prices for flour are fixed by Shanghai and Hongkong. Hongkong figures very conspicuously in the northern flour markets as they carry heavy stocks of flour down there and have splendid facilities for shipping which makes Hongkong a competitor in the northern markets. Hongkong is the distributing point for southern China

(Testimony of William H. Birtt.)

and beyond. Shanghai is not a competitor in Saigon, Singapore and southern ports.

Mr. FLEMING.—Take the witness.

Cross-examination.

Mr. FESSENDEN.—Q. Mr. Birtt, were you in Chefoo at any time from October, 1911, to the end of April, 1912?

A. No, sir; I was not, Mr. Fessenden. I was there in November, 1912.

Q. You testified as to the general market prices of flour ruling between certain dates—October, 1911, and April, 1912, and I understood you to say there was no appreciable [220] decline in the price of flour between the first of March and the middle of April, 1912?

A. No, sir; not in the local prices here. The prices may have fluctuated a cent or so but from a business standpoint they were quite regular. My prices on flour would be settled by wire, but someone quite anxious to make a sale might quote a little under me but that would not be what we would call the market price; it would be a cut price.

Q. There was a sharp decline in the price of flour in November, 1911? A. Yes, sir; in November.

Q. And in December, 1911, and January, 1912, there was a steady decline?

A. Oh, about practically the same—about 1.65—1.78 and then 1.77 in November and then it declined to about 1.65 in February, 1912.

Q. Your testimony is that there was a sharp decline in November of 1911? A. Yes, sir.

(Testimony of William H. Birtt.)

Q. And in December? A. About the same.

Q. And January, 1912?

A. About the same and February was Chinese New Year and there was nothing done.

Q. And March, 1912?

A. 1.65. Ordinarily that would be about the price to the end of April.

Q. And there was a sharp decline after that?

A. Yes, sir; there was. It was offered here at 1.53 in May. Mr. Connell sold at 1.56. He was disposing of some for one of his buyers.

Q. Prior to April, 1912, there was a heavy decline in the price of flour and the decline continued after that?

A. Yes, sir; in May there was a decline. Our prices were raising; everything had to do with exchange; the exchange was going up; the exchange was up to 70. I could have sold flour say at 4.12½ in October and then in April sold for 4.37½ which would have been cheaper for the buyer than [221] the April quotation by reason of exchange. The exchange you understand consumes the difference in price in gold.

Q. I understand that—what I am driving at is this one point. From October, 1911, to April, 1912, there was a decline in the flour market?

A. Yes, sir. In the first instance, if Diederichsen & Company had not settled exchange, they would have made from eight thousand to fourteen thousand taels on that one shipment of flour.

Q. Never mind that. Prior to April there was

(Testimony of William H. Birtt.)

more or less of a decline in the flour market—decline in price? A. Yes, sir; very much of a decline.

Q. And right subsequent to April there was a still further decline in the price of flour?

A. Up to the end of April the prices were practically stationary but after that the prices declined very much.

Q. When did the decline begin?

A. In November there began to be a decline in prices, the price was 1.85. In October the prices were high. January they declined and in February and March and April they remained almost on a par.

Q. Then they declined?

A. Yes, sir; declined in May. In May they declined quite steadily.

Q. And at that time there was large stocks of flour in China?

A. Yes, sir; the go-downs were full and the buyers falling over each other to dispose of them.

Q. That was the condition existing about the time the “Harpagus” was lying in the Chefoo harbor with eighty thousand sacks of flour aboard of her?

A. Yes, sir.

Q. The stocks of flour in China at that time was very large? A. Yes, sir; undoubtedly they were.

Q. They were perhaps the largest stocks of flour on hand in [222] the history of this port?

A. Yes, sir; during that one time except in 1907. The reason of the accumulation was due to the falling of exchange and the rebellion and there were numerous losses made.

(Testimony of William H. Birtt.)

Q. What I want to get at is, wouldn't this enormous accumulation of flour in Shanghai affect the Chefoo flour market?

A. The Chefoo flour market prices are fixed by the flour market prices of Shanghai and Hongkong as I explained to you. The flour dealers of Chefoo know all about the stocks of flour on hand in Shanghai and know the flour market prices here, and when they want flour they send a telegram for the Shanghai prices, and our buyers send a telegram to me when I am in China and I quote them a price.

The COURT.—Confine yourself to answering the questions, Mr. Birtt, please, and we will get along much faster.

Mr. FESSENDEN.—Q. I asked you if the accumulation of this enormous quantity of flour in Shanghai would not affect the flour market of Chefoo?

A. It would affect it, of course; it would affect the price; the prices here affect that market at Chefoo. When they are getting a good price here they are getting it also in Chefoo. The Shanghai and Hongkong flour markets sets the price at any time and every time and sets it to-day.

Q. The Shanghai flour merchants having this vast accumulation of flour here in the go-downs the Chefoo flour dealers could buy it from the merchants here in Shanghai? A. Yes, sir.

Mr. FESSENDEN.—That is all.

Redirect Examination.

Mr. FLEMING.—Q. Mr. Birtt, referring to these

(Testimony of William H. Birtt.)

heavy stocks of flour stored in the go-downs of Shanghai in 1912 which came from America, do you know when that flour had been [223] ordered for shipment from America? A. In October, 1911.

Q. And the flour began to arrive early in the year 1912?

A. In think in December, 1911, it commenced to arrive.

Q. And prior to March, 1912, the big part was on hand in Shanghai? A. Yes, sir.

Q. And the balance was coming forward?

A. Yes, sir.

Q. You stated, Mr. Birtt, that the local price of flour in China stood practically the same throughout February, March and April, 1912—1.65 per bag?

A. Yes, sir.

Q. And the price of 1.65 which you gave us as prevailing during those months was for small lots?

A. Yes, sir. I make no sales at all except to the big firms like Connell Brothers, The China & Japan Trading Company and Mustard & Company and others who represent us here. The local prices I have given are those which the Chinese quoted me on those days.

Mr. FLEMING.—That is all.

Recross-examination.

Mr. FESSENDEN.—Q. Mr. Birtt, you say that the accumulation of flour in Shanghai in 1912 began along as early as March?

A. As I now remember it, it was in December, 1911, that the first shipment arrived and continued

(Testimony of William H. Birtt.)

right along steadily, and the Chinese buyers were not moving their stocks out due to the rebellion. The very same conditions existed in Tientsin. They had enormous stocks there and they were over a year working those stocks off up there.

Q. Why should the price of flour remain steady in February, March and April with all this steady accumulation of flour coming in to these different distributing ports?

A. The local price of flour in February, March and April, 1912, [224] was 1.65. That might fluctuate two or three cents during that period mentioned.

Q. If the accumulation of these large quantities of flour began as early as December, 1911, and continued to pile up until March, it seems to me the market price of flour would fall, would decline. You state that afterwards during those three months, February, March and April, the market price of flour locally still remained steady?

A. Yes, sir; because those months were favorable months. After April the months are not so favorable and the buyers had to sacrifice everything in order for them to carry their holdings over.

Mr. FESSENDEN.—That is all.

Mr. FLEMING.—That is all.

[Testimony of W. S. Emens, for Defendant.]

W. S. EMENS, called as a witness on behalf of defendant and sworn.

Mr. FLEMING.—Q. Mr. Emens, how long have you resided in China? A. Over thirty years.

(Testimony of W. S. Emens.)

Q. I will ask you, Mr. Emens, if you speak and read the Chinese language?

A. I speak the language and read it some.

Q. For how many years have you studied Chinese?

A. About a year after I arrived here I commenced.

Q. You began studying the language immediately after your arrival here?

A. Yes, sir; about a year after.

Q. How long have you been able to read the Chinese language?

A. For a good many years. At one time I was better able to read it than I am now. It is a question of practice.

Q. Do you understand commercial Chinese writing? A. Yes, sir.

Q. I show you Plaintiffs' Exhibit "H," purporting to be a Chinese contract for the purchase of flour, and ask you to tell [225] us what that contract says with regard to time of delivery.

A. (After examination of exhibit.) This is a contract made the 9th moon and 3d day. As regards delivery, it says here about delivery in the third moon foreign fashion. That would be March and later, March or after.

Q. March or after? A. Yes, sir.

Q. Would a delivery in April be within the terms of that contract—those words "March or after"?

A. I should say any time during April so far as I can see.

Q. Any time during April?

(Testimony of W. S. Emens.)

A. March is stated definitely and it says "and later."

Q. You take it that the Chinese words there mean that a delivery in April would have to be accepted?

A. If I was selling the flour I would insist upon it being March or April.

Q. Mr. Emens, your business is that of a merchant? A. Yes, sir; it is.

Q. And you have been a merchant in Shanghai for many years? A. Yes, sir.

Q. And you have dealt in flour? A. Yes, sir.

Q. And are dealing in flour now? A. Yes, sir.

Q. And keep in touch with the flour market in China? A. Yes, sir.

Q. Can you state as to whether there was an decline in the price of flour between October, 1911, and February, 1912?

A. If I remember right, towards the end of 1911 flour went down and exchange went up.

Q. Well, do you remember that during the months of March and April, 1912, what the condition of the flour market was in Shanghai?

A. Yes; it was rather steady for the first part of 1912, not much fluctuation one way or the other, until after Chinese New Year in May when flour [226] always declines on account of the weather.

Q. That would be after the Chinese New Year?

A. To the middle of February it was rather steady.

Q. Up to the middle of February then there was not much change?

A. No, sir; it was steady during that time.

(Testimony of W. S. Emens.)

Q. Can you say about what the market price of flour was at that time, small lots, in March and April, 1912?

A. It would depend somewhat on the brand. The ordinary export flour was at that time say probably in Shanghai one and six maïs about. The fluctuation was about five candareen cents. March and April you mean?

Q. Yes, sir; March and April, 1912?

A. I would say during March and April, 1912, 1.65 and perhaps 1.60 would be about the price that it was selling for at that time.

Q. Depending somewhat upon the brand of flour?

A. Yes, sir. One brand might bring 2½ cents more than another brand of flour.

Q. But there would be probably no difference in the quality?

A. That might be true. If persons had stock on hand and wanted to get rid of it it would make a difference also.

Q. You have stated that the flour market was quite steady in March and April, 1912—from Chinese New Year on? A. Yes, sir.

Mr. FLEMING.—Take the witness.

Mr. FESSENDEN.—No questions.

Mr. FLEMING.—That is our case, if you Honor please.

Mr. FESSENDEN.—I will rest my case, your Honor.

(Testimony closed.) [227]

Defendant's Exhibit "A-1."

Date,		1st.	2d.	3d.	Add on 2¢ Per Bag for Int. &c.	4th.	5th.
		Gold. Price Per 4 Bags c. i. f. Shanghai.	Exch.	Price Per Bag S'hai Tael.		Approximate. Net Price Per Bag S'hai Tls.	Selling Price in Lge. Quan- titles.
Sept.	2.	3.92½	58	1.691-		1.72	1.75
"	5.	4.02½	57⅞	1.739-		1.76	1.77½
"	7.	4.05	58	1.745-		1.77	1.77½
"	12.	4.12½	57¾	1.785-		1.81	1.77
"	25.	4.10	57⅞	1.771-		1.79	1.80
Oct.	2.	4.12½	58	1.778-		1.80	1.82½
"	16.	4.12½	57⅞	1.781-		1.80	1.85
"	25.	4.12½	59¼	1.740-		1.76	1.85
Nov.	1.	4.10	59⅞	1.726-		1.75	1.82½
"	15.	4.10	60⅞	1.697-		1.72	1.77½
"	25.	4.10	60	1.708-		1.73	1.77½
Dec.	1.	4.10	60¼	1.701-		1.72	1.75
"	15.	4.10	60⅞	1.704-		1.73	1.72
"	27.	4.07½	60	1.698-		1.72	1.72
1912.							
Jan.	3.	4.05	60⅞	1.677-		1.70	1.72
"	16.	4.00	61	1.639-		1.66	1.70
"	25.	3.95	61⅞	1.608-		1.63	1.67½
Feb.	2.	4.07½	63⅞	1.595-		1.62	1.65
"	15.	4.17½	65¾	1.587-		1.61	1.65
"	26.	4.17½	64⅞	1.621-		1.64	1.65
Mar.	1.	4.17½	64⅞	1.609-		1.63	1.64
"	15.	4.17½	64½	1.618-		1.64	1.63
"	25.	4.22½	64⅞	1.634-		1.66	1.63
Apr.	1.	4.22½	64¼	1.644-		1.66	1.62½
"	13.	4.37½	64⅞	1.699-		1.72	1.62½
"	26.	4.37½	66¼	1.654-		1.67	1.62½
May	1.	4.40	66¾	1.648-		1.67	1.61
"	15.	4.37½	66¾	1.638-		1.66	1.58
"	25.	4.37½	66¾	1.638-		1.66	1.55
Jun.	1.	4.37½	66⅞	1.635-		1.66	about 1.52½
"	15.	4.37½	67¼	1.626-		1.65	" 1.52½
"	25.	4.37½	67⅞	1.617-		1.64	1.52½
Jul.	3.	4.25	66½	1.598-		1.62	New crop, future shipment
"	15.	4.25	65¾	1.616-		1.64	1.55
"	25.	4.07½	65⅞	1.546-		1.57	1.52½
Aug.	1.	4.07½	65¼	1.561-		1.58	1.52
"	15.	4.07½	66¼	1.538-		1.56	1.48
"	26.	4.07½	66	1.543-		1.56	1.48
Sept.	2.	4.15	67	1.548-		1.57	1.47½
"	16.	4.15	67⅞	1.534-		1.55	1.47½
"	26.	4.12½	68½	1.505-		1.53	1.45
Oct.	2.	3.97½	70	1.419-		1.44	1.45
"	15.	3.97½	69¾	1.425-		1.45	1.45

This concluded the evidence and the foregoing constitutes all the evidence received at said hearing. Both parties rested and on the 25th day of October, 1913, said cause was argued by counsel for both parties and submitted to the Court for decision.

And be it further remembered that thereafter, to wit, on the 4th day of November, 1913, the Court did render its decision and judgment, holding, finding and deciding that because the defendant did not ship the flour mentioned in said contract during the month of February, 1912, the plaintiffs were entitled to and did rescind said contract; that the plaintiffs were entitled to take possession of said flour and sell it for the best terms obtainable, crediting the net proceeds of such sales to the defendant; and that the plaintiffs were entitled to recover from the defendant the difference between the contract price of said flour and the net proceeds of the sales of the same by the plaintiffs, and that the plaintiffs were also entitled to recover interest upon said contract price and the expenditures of the plaintiffs in handling said flour; and holding, finding and deciding further that judgment should be entered in favor of the plaintiffs and against the defendant for the sum of \$3,830.89, United States gold coin, together with the costs of suit.

Fifth Exception.

To which ruling of the Court the defendant [229] then and there excepted.

And now on this fifth day of November, 1913, the defendant presents this, its bill of exceptions, and

prays that the same be allowed, signed, sealed and made a part of the record herein.

FLEMING & DAVIES,

Attorneys for Defendant.

[Order Approving, Allowing and Settling Bill of Exceptions.]

The foregoing bill of exceptions is correct in all respects, and is hereby approved, allowed and settled and made a part of the record herein.

Done in open court this sixth day of November, 1913.

RUFUS H. THAYER,

Judge of the United States Court for China. [230]

(Title of Court and Cause.)

Opinion and Judgment [June 9, 1913].

This action is brought to recover damages alleged to have been suffered by reason of breach of contract for the sale and shipment of certain flour.

The memorandum contract in the matter is as follows:

“Chefoo, Oct. 17th, 1911.

CONTRACT.

This certifies that we have this day ordered for Messrs. H. Diederichsen & Co., Chefoo, the following goods to be shipped by steamer sailing from either of the following ports:—Seattle, Tacoma, Portland, San Francisco, Vancouver, during the month of February, 1912.

Terms Confirmed Bankers Letter of Credit Three days sight draft with interest, Documents Delivered against payment.

The goods, to be for the account of the Buyers, who are to bear all risk of damage, shortage, leakage and breakage also all risk of fire.

All agreements herein contained or implied are contingent upon strikes, accidents and other delays unavoidable or beyond our control.

80,000 (eighty thousand) bags of American Flour (standard 49 lbs.) quality equal to what is known under the brand of "Morjon" at the price of G. \$4.15 (G. \$ four and fifteen cents) per four bags C. I. F. Chefoo.

Insurance risk (with average, free of 3 (three) %, if not better available) to cover sound delivery, to be covered by shippers in the name of Consignees.

CONNELL BROTHERS COMPANY,

pp. A. A. BOUGHTAN.

The steamer upon which shipment was made did not sail in the month of February. It sailed from Tacoma on March 8, 1912.

The defendant contends that circumstances were such that failure on his part to make shipment during the month of February comes within the provisions of the exemption clause in the contract, and issue has been made on that question, evidence taken and, on stipulation [231] of counsel, that question has been argued by counsel and submitted to the Court as a preliminary question, it being agreed that if that question is decided adversely to the defendants, further proofs may be taken on the question of damages.

On the proofs in the record it is sufficiently established that the defendant company took the order in

good faith and at all times evinced good faith in their efforts to have the shipment made in the month of February. In fact, there is no evidence that defendants could have benefited in any way by a delay of shipment. The question as to whether or not they used due diligence in arranging for shipment within the time prescribed by the terms of the contract will be considered later.

It appears that the contract was made on October 17, 1911. In the latter part of December, through regular shipping channels they arranged for the charter of the ship "Indien," which was then in South Atlantic waters and was reported to be due in San Francisco on January 25, 1912, and was claimed by Agents would be in Tacoma in early February. While the proofs of these facts are not in the most conclusive form, the negotiations appear to have been conducted in the usual way and the information received by the defendants seems to have been such as would be ordinarily accepted by commercial agencies as reliable.

It seems obvious to the Court that in such matters absolute certainty could be rarely commanded. However, the "Indien" was unable to arrive in time. Whether or not due to any accident to her machinery is not shown in the proofs. Some time in January the defendants were notified that she could not arrive in time [232] for February shipment and immediate effort was made to secure another ship, with the result that the "Harpagus" was chartered for this shipment.

The proofs show that this ship was expected to

arrive in Puget Sound by the middle of February; that she did so arrive on that date at the Government Navy Yard at Bremerton loaded with coal; that some delay occurred in her unloading there and that she did not arrive at Tacoma, the point of this shipment, until February 29; that the loading of the flour began on March 2 and was concluded on March 3 and that the ship sailed on March 8, 1912.

It is thus seen that the flour was not shipped during the month of February, 1912, and that there was a breach of the contract in that respect by the defendants, unless they can show that the delay in shipment was due to some one or more of the excepted causes recited in the contract.

It is well settled that "in the contracts of merchants time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view to providing funds to pay for the goods, or of fulfilling contracts with third persons." *Norrington vs. Wright*, 115 U. S., 188.

The provision in the contract that the shipment should be made in February is as obligatory as are the quantity and brand of flour to be shipped. As the defendants are bound by that material provision and seek to avoid its binding effect, the burden of proof is on them to show that failure to ship in that month was due to some of the excepted causes recited in the contract. As a preliminary proposition it [233] must be held that defendants must show that they used due diligence in providing for this shipment in accordance with the provisions of the con-

tract, otherwise no resort can be had to the excepting clause.

The question of what constitutes due diligence in a particular case must depend on the facts and circumstances of each case.

In the case at bar the shipment was required to be made from one of five American Pacific coast ports and was for transportation across the Pacific Ocean to one of the minor ports of China. Chefoo, the port of delivery, has no direct steamer connection with any of the five ports named. Shipment by any of the regular transpacific steamship lines would require transshipment and not only, presumably, increase the cost for transportation to the shipper but result in loss of time to the consignee. The reasonable and customary course in such cases would be to seek a ship for charter for direct shipment where the consignment in tonnage was as large as in this case.

The first step taken by the defendants was the negotiations for the charter of the "Indien." The contract was made October 17, 1911. The proofs fail to show that negotiations were begun with reference to securing any ship until the early part of December. The agreement for charter was made on December 29.

At that time the "Indien" was supposed to be at or near Buenos Ayres. The agents reported by letter of December 30th:

"The steamer is expected to have left Buenos Ayres to-day for San Francisco via Coronal, and eventually a nitrate port and we expect her

discharge at San Francisco about the 15th/20th February.”

If the time consumed in sailing from San Francisco to Tacoma is added to February 20th, it is [234] obvious that the margin for loading and sailing in the month of February is very narrow. It is clear, we think, that there was not such a factor of safety as would have been insisted upon by a prudent business man who stood to commit a serious breach of contract in the event of the failure of the ship to reach Tacoma and load and sail during that month.

There is another material fact, viz.: That the lay days under the charter-party began on February 10th and ended on March 10th. In other words, the “Indien” under the charter was not bound to complete loading at Tacoma until March 10th.

Upon this state of fact it cannot be held that in the agreement for charter of the “Indien” the defendants used that diligence to which they were reasonably bound by the provisions of the contract relative to time of shipment.

Nor do the proofs show that the “Indien” suffered any accident. The utmost alleged is that she was detained in Buenos Ayres for repairs.

Now, as to the “Harpagus.” The defendants learned that the “Indien” could not load and sail in February, about January 25th, and immediately arranged for shipment of the flour by the “Harpagus.” It is in proof that this ship was the only tonnage for February that could be secured; that defendants were assured that she would be at Tacoma ready for loading not later than February 25th; that

she actually arrived at the U. S. Navy Yard at Bremerton, near Seattle, on February 15th; that she was loaded with coal for the U. S. Government, but was unable to discharge her load and reach Tacoma until February 29. The proofs do not show affirmatively that the "Harpagus" was unduly [235] delayed in discharging her coal at the Naval Station, but it is fair to assume that the consumption of nearly two weeks in that work was an unreasonable time. It is shown that the defendants and their agents were active in their efforts to secure her presence at Tacoma not later than the expected date, February 25th.

It is shown that the entire quantity of flour for said consignment was on the dock ready for loading on February 21 in anticipation of the arrival of the "Harpagus."

The Court finds that the defendants exercised due diligence in respect to the chartering of the "Harpagus." The defendants' imprudent reliance on the uncertain conditions of the "Indien" charter had brought them into the unfortunate position of being compelled to rely alone on the "Harpagus."

It is hardly necessary for the Court to make any formal finding that the movements of the chartered ships, before reporting under their charter, are not subject to the physical control of the shippers since that is an obvious fact.

Can the defendants be excused for this breach of contract for any of the causes recited in the excepted clause of the contract? It is not alleged that there were any strikes which interfered with the sailing.

Nor do the proofs show that there were any accidents which prevented the sailing.

If the defendants are to be excused it must be by reason of "other delays unavoidable or beyond their control."

The exception clause was inserted in the contract by the defendants. It was intended for their benefit. The words "strikes" and "accidents" are definite [236] and specific. The following words, "or other delays unavoidable or beyond our control," are general and comprehensive and require construction in the light of the facts of the particular case. Inasmuch as they are introduced by the defendants and intended for their benefit, they must be construed strictly and favorably to the other party.

This rule is fundamental.

Orient Mut. Ins. Co. vs. Wright, 1 Wall. 456.

Garrison vs. U. S., 7 Wall. 688.

Avoman vs. Bradley, 9 Wall. 394.

On the facts found in this case no consideration can be shown to the defendants by reason of the charter of the "Indien." In fact, although the contract was made in October, the proofs show that no steps were taken by the defendants to provide for this shipment in the month of February until in December, and that it was not until December 29th that this ineffective charter of the "Indien" was made. It is apparent that the proximate cause of the position in which the defendants found themselves near the end of January, 1912, was due to a lack of exercise of due diligence in providing for the certain shipment in February as stipulated in the contract. Fail-

ure in this respect imposed upon them a dangerous risk as was demonstrated by the subsequent events. With this state of fact shown the vital question is raised whether the diligence shown in securing the "Harpagus" put the defendants in a position such as would enable them to claim benefit because the delay of the "Harpagus" was beyond their control.

We think that this question must be answered in the negative. From date of contract to last date for shipment defendants had more than four months which should certainly be regarded as ample time within which [237] to make all provisions therefor.

They cannot be allowed to fritter away more than half of that time in ineffective negotiations and yet plead successfully that delays subsequently occurring were unavoidable and beyond their control.

For the construction of the excepting clause of the contract the plaintiff has invoked the doctrine of *ejusden generis*. This doctrine or rule of construction may be defined as follows:

"When the particular dangers or risks against which a party has specifically guarded himself in a contract are followed by more general and comprehensive words of exception, the latter are to be construed to embrace only occurrences *ejusden generis* with those previously enumerated unless there is a clear intent to the contrary."

The particular risks specified in the excepting clause are "strikes" and "accidents." The general words following are "other delays unavoidable or

beyond our control." Under the rule invoked the exemption provided for would apply only to delays due to accidents and strikes.

Counsel for the plaintiff has cited numerous English cases in which this doctrine has been recognized and applied.

Richardsons vs. M. Samuel & Co., L. R. 1

Queen's Bench, 1898, pg. 261.

Carvers, Carriage by Sea, sec. 258a.

The Rookwood, 10 T. L. R., pg. 314.

The Village Bell, 30 L. T. pg.

Grant vs. Todd, L. R. Appeal Cases, Vol. IX, pg. 470.

Fenwick vs. Schmalz, L. R. C. P., Vol. 3, pg. 313.

It is a recognized doctrine in American authorities.

Hutchinson on Carriers, Vol. 1, sec. 465.

In the case of U. S. vs. Irwin, 26 Fed. Cases, [238] 546, the Court holds:

"If general words in a statute follow an enumeration of particular cases they are held to only cover cases of the same kind as those expressly mentioned."

There are numerous other American cases which while they do not specifically cite this doctrine as the basis of decision recognized the principle upon which it is founded—viz.: that general words of exception in a charter-party or bill of lading must be construed with great strictness.

Sorenson et al vs. Keyser, 52 Fed. Rep. 163.

Texas & Pacific Ry. Co. vs. Reis, 186 U. S. 621.

The India, 49 Fed. Rep. 76.

It is but fair to say that the rule does not seem to

have had as wide a recognition in American courts as in England. But this court is satisfied that it is founded on sound reason and should be accepted and applied.

On the preliminary question, "Does the failure of the defendants to make shipment during the month of February, upon the state of fact shown in this record, come within the provisions of the exemption clause in the contract"? The judgment of the Court is that it does not. The answer is adverse to the defendants.

RUFUS H. THAYER,
Judge.

June 9, 1913. [239]

(Title of Court and Cause.)

Opinion and Judgment [November 4, 1913].

The action in this case relates to a contract between the parties for eighty thousand bags of American flour of standard specified, which contract was made October 17, 1911.

The contract provided that the flour should be shipped from one of the five named Pacific American ports during the month of February, 1912, consigned to Chefoo, China.

Shipment was made from Tacoma, Washington, on March 8, 1912.

Under stipulation of counsel an issue was made as to whether or not failure to make shipment during the month of February, 1912, under the circumstances disclosed in the evidence, constituted a breach of contract on the part of the defendant company. That issue was tried by the Court and judgment rendered

adverse to the defendant. It was held that such failure did not come within the provisions of the exemption clause in the contract between the parties.

There was left for adjudication the question of what damages if any the plaintiff had suffered by reason of said breach.

It must be observed that the decision on the preliminary issue was reached without any reference to damages possibly resulting from a breach of contract, the Court not having before it at that time any evidence relating thereto.

The whole case has now been submitted. The [240] material facts disclosed by the evidence are:

1. That the shipment of the cargo was actually made from Puget Sound on March 8, 1912.
2. That the cargo arrived at Chefoo on April 16, 1912.
3. That on the 8th of April, 1912, the plaintiffs cabled the defendants at Shanghai:

“ ‘Harpagus’ we are informed sailed Puget Sound 14th day of March. We must hold you responsible for nonperformance of contract. Buyers making heavy claims or will refuse the goods communicate with our Shanghai office.”

That on April 17th, 1912, plaintiffs further cabled defendants:

“ ‘Harpagus’ arrived. Consignees buyers refuse to receive the goods, is at your disposal.”

4. That defendants made no answer to Chefoo to these cables, but did call at the Shanghai office of the plaintiffs and verbally disavowed any responsibility for said cargo announcing that they had fully

complied with the terms of their contract.

5. That plaintiffs then took possession of the cargo and sold it in open market from time to time at the best terms they could obtain.

The contention of the plaintiff is that the defendant company failed to fulfill a condition precedent in said contract, viz., to make shipment of the flour during the month of February, and that in view of that breach the plaintiff was entitled in law to repudiate and rescind the contract.

It appears in evidence that the plaintiffs first learned that the shipment had not been made as per contract in the early part of April, 1912, and that on the 8th of April defendant was informed by telegram that plaintiffs would hold them responsible for nonperformance, and, on April 17th, the day after the arrival of the "Harpagus" at Chefoo, plaintiffs advised the defendants that the goods were at their disposal. This [241] was certainly a specific notice to defendants that the plaintiffs refused to accept the goods and intended to assert their legal right to repudiate the contract.

There is no legal significance in the statement made in the latter telegram that "consignees buyers refuse to receive the goods."

It appears from the evidence that such was the fact, but that fact could have no bearing as affecting the rights of the parties at this stage.

The vital question is could the plaintiffs at that time lawfully repudiate the contract?

The cargo had not been shipped during the month of February. Without notice to consignees it had

been shipped on March eighth.

We think that the answer to this question admits of no doubt. Defendant having failed to make the shipment within the time agreed upon, they were not in a position to demand an acceptance of the cargo, or to enforce its acceptance. They had failed to perform a condition precedent which was essential to give them such right.

The rule applicable to this state of fact is fundamental and well established.

Mechem on Sales, Vol. 2, secs. 1138–1148.

This rule is clearly announced in the case of *Norington vs. Wright*, 115 U. S. 188, wherein it was held, after distinguishing the cases.

“In a mercantile contract a statement descriptive of the subject matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty or condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract.”

It is noticeable that the ruling made in this [242] case followed an exhaustive consideration of both American and English decisions.

As against the applications of this rule the defendants contend that the plaintiffs had already accepted delivery of the cargo, since bills of lading and accompanying documents were endorsed over to the plaintiffs' agents at the time when the cargo was paid for and all this in accordance with the terms of the contract of sale.

The Court cannot regard this contention as sound.

An examination of the contract shows that the defendants agreed to ship these goods from one of several ports on the American side of the Pacific, that they were to be shipped within a certain specified limited time, that they were to be paid for in a certain way and that documents were to be delivered against payment. The evidence shows that such documents, bills of lading and policy of insurance, were furnished and duly endorsed on February 28, 1912, and that payment of the contract price was paid on same date, although the whole cargo was not actually loaded on the ship until March 2 and the ship did not sail from the loading port until March 8.

It is not contended that the documents duly endorsed were tendered to plaintiffs' banking agents with fraudulent intent, neither is it contended or asserted that plaintiffs had knowledge at the time that the bills of lading were not true documents, or that the plaintiffs had concurrent knowledge of the breach of the contract on the part of the defendant company. On the face of these documents it would appear that this shipment was made within the contract period and the banking agents of the plaintiffs would thus understand, if they considered the matter at all, that compliance [243] with the contract in this respect had been made. The payment of the contract price was based on these documents which contained a false statement of a material fact for which defendants must be held accountable.

If, as urged by the defendants, the bank is to be regarded as a plenary agent of the plaintiffs clothed

with authority to accept delivery of this cargo at time of payment, then it is obvious that it was misled into so doing by misrepresentation made by the defendants. Defendants cannot benefit by their fault.

The contention of defendants when analysed amounts to this: "Although by misrepresentation we induced the payment for this cargo at a time when we were not entitled to payment, such payment must be construed as a full acceptance of the cargo by the plaintiffs."

But the Court, on the evidence in this record, does not regard the bank as a general agent of the plaintiffs in this matter.

It was authorized to make payments on tender of certain documents duly assigned to consignees and there is nothing to indicate that any other service was contemplated than that usually accompanying a transaction of payment of a contract price, with the sole condition of tender of described papers.

Undue significance is attached to the phrase "February—March shipment" in the instructions to the bank.

The Court does not think that these words in the connection used can be reasonably regarded as instructions from plaintiffs that the goods might be shipped at the ports named during either of those two months. The words do not necessarily import such meaning. It is more reasonable to assume that if the plaintiffs contemplated giving any instructions on this point they would [244] have given them in clear terms. But even if such instructions

had been given to bankers as full agents of consignees, they were ineffective and produced no result as touching defendants breach of the contract, since the documents were tendered by defendants and received by the bank and payment made during the month of February, the period for shipment stipulated in the contract.

The Court is unable to regard the payment for this cargo, at the time and place made, as constituting a delivery of the goods to consignees or as an acceptance of said goods under the terms of this contract.

In case of breach by a consignor the consignee may waive his right of repudiation or rescission, either in specific terms or by this act or acts which the law will construe as amounting to a waiver. There is no evidence in the record tending to show on the part of the plaintiffs any waiver in specific terms, and the record is equally free of any evidence of acts which are capable of being construed as showing purpose to waive the right of repudiation.

The plaintiffs acted with reasonable promptness. Their notice to the defendants was timely made. They refuse acceptance of the goods and so advised the defendants.

In answer the defendants claimed full compliance with the contract and abandoned all further interest in the matter.

The status of the matter at that time was that the plaintiffs had paid in full for the cargo without knowledge of the breach; and had elected to repudiate and rescind the contract and tendered the cargo back to defendants who refused to receive it.

Under the circumstances the question arises as to

how the plaintiffs were to deal with this cargo. [245] In order to maintain their right to rescind the contract and recover the purchase money, must they abandon the cargo and refuse to take possession of it?

The rule in such cases is reasonably clear and well settled that it is the duty of the party wronged to use reasonable means to lessen the damage which may result from the wrong. When, as in the case at bar, the party wronged has already paid the full contract price, the duty to adopt this course is merged into his legal right to do so in order to conserve his own interests.

The evidence shows satisfactorily that the plaintiffs landed the cargo, stored it securely and sold it from time to time at the best rates obtainable.

There is no evidence tending to impeach their evidence that they used all reasonable efforts to obtain the highest market rate for the whole cargo.

Considerable attention was paid by the parties respectively to the subcontracts made by the plaintiffs and to the question of varying rates of exchange as affecting alternative courses which might have been adopted. Neither of these matters, in the view taken by the Court, are material to the issues in this case, and it is not deemed necessary to discuss them. The contract price is stated in gold dollars. The breach on the part of the defendants entitles the plaintiffs to repudiate and rescind the contract as a whole. The defendants disavowing any responsibility for the breach and refusing to take the cargo back, the plaintiffs were well within their legal rights to take possession of the cargo and dispose of

it on most favorable terms obtainable, crediting the net proceeds of such sales [246] to the defendants. They are entitled to recover from the defendants the difference between the net proceeds of such sales and the contract price, plus incidental expenses, and interest.

The evidence shows that the cargo was not sold in bulk but in lots of varying sizes and on every occasion for cash in Chefoo taels. As the proceeds of any sale were received the plaintiffs were in effect reimbursed at that moment for a certain part of the contract price. The defendants were entitled, therefore, to receive a credit in gold equivalent to the value in gold of such proceeds as of the day of sale. It is a well-known fact, well established in this record, that exchange from Chinese currency to gold is subject to large fluctuations from day to day. In determining the gold value of the proceeds of any sale the rate of exchange of the day of sale must be applied. These several sales were made at various times from May to October.

The plaintiff is entitled to receive interest at the rate of six per centum on the contract price from February 28 to May 24, 1912, the date of first sale, and from that date on the contract price less the proceeds of said sale, and further interest items are to be computed in the same manner.

The plaintiffs are also entitled to amounts necessarily expended in handling said cargo, for lighterage, insurance, coolie hire, storage and matting.

Computations made on the basis of the Court's holdings are in accordance with the following tabulated statement: [247]

Judgment is given for the plaintiffs for the sum of Three Thousand Eight Hundred Thirty & 89/100 (\$3,830.89) Dollars, currency of the United States, and costs of this action.

RUFUS H. THAYER,

Judge.

Shanghai, China, November 4, 1913. [248]

In the United States Court for China.

Civil Action No. 118.

Original Paper No.—

Filed at Shanghai, Nov. 6, 1913. Edward H.
Murray, Acting Clerk of Court.

H. DIEDERICHSEN & COMPANY,

Plaintiffs,

vs.

CONNELL BROTHERS COMPANY, a Corpora-
tion,

Defendants.

Petition for Writ of Error.

And now comes Connell Brothers Company, a corporation, the defendant herein, and says that on or about the 4th day of November, 1913, this Court entered judgment herein in favor of the plaintiffs and against the defendant, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of this defendant, all of which will in more detail appear from the assignment of errors which is filed with this petition.

Wherefore this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Ju-

dicial Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

FLEMING & DAVIES,
Attorneys for Defendants. [249]

In the United States Court for China.

Civil Action No. 118.

Original Paper No.—

Filed at Shanghai Nov. 6, 1913. Edward H. Murray,
Acting Clerk of Court.

H. DIEDERICHSEN & COMPANY,
Plaintiffs,

vs.

CONNELL BROTHERS COMPANY, a Corpora-
tion,
Defendant.

Assignment of Errors.

Now comes the defendant in the above-entitled action and in connection with its petition for a writ of error makes the following assignment of errors which it avers occurred in the trial and decision of this cause in said Court, to wit:

First. That said Court erred in striking from the deposition of A. S. Haines, a witness for the plaintiffs, and refusing to receive in evidence the following testimony given during the cross-examination of said witness, to wit: "We had continuous correspondence with the Centennial Mill Company, which I read over this morning, showing that we advised them from time to time of the arrival of the

boat, the progress of the discharge, and assuring them that we still expected to load the flour in February; and as the dates progressed we finally informed them it would be the 1st of March when we loaded the flour," with the exception of the words, "We still expected to load the flour in February."

Second. That said Court erred in striking from the deposition of M. J. Connell, a witness for the defendant, and refusing to receive in evidence portions of the testimony, given during the direct examination [250] of said witness, which testimony was in substance as follows: "That it was not within the power of the defendant to have avoided the delay in the arrival of the steamship "Indien" on Puget Sound for the purpose of taking on the shipment of flour. That the reason why the clause "All agreements herein contained or implied are contingent upon strikes, accidents and other delays unavoidable or beyond our control," was included in all orders for merchandise to be shipped by the defendant to the Orient, was that the defendant had no control over the steamships and could only ship as the steamships sailed. That said clause was inserted in all orders for merchandise shipped to ports to which no regular lines of steamers operated, and that an exporter from Puget Sound handling a product such as flour upon orders for shipment to ports in the Orient to which no regular line of steamships operated could not conduct an export business unless such a clause was inserted in their agreements.

Third. That said Court erred in striking from the deposition of L. P. Baumann, a witness for the defendant, and refusing to receive in evidence portions

of the testimony given during the direct examination of said witness, which testimony was in substance as follows: That there was nothing within the power of the Centennial Mill Company to have been done, after they had chartered first the "Indien" and later the "Harpagus" to have avoided the delay to the "Indien" in the first place or the delay of the "Harpagus" in the second place; and that there was no way in which the Centennial Mill Company could have controlled the movements of these vessels so as to have caused either of them to arrive at Tacoma for the purpose of taking on the flour at the due date.

Fourth. That said Court erred in holding, finding and deciding that the defendant had committed such a [251] breach of the terms of the contract between the plaintiffs and the defendant as to the shipment of the flour mentioned therein as would render the defendant liable to the plaintiffs in damages if damages had in fact been sustained by the plaintiffs.

Fifth. That said Court erred in not holding and deciding that the delay in the shipment of said flour was due to causes over which the defendant had no control, and that said delay was within the exception in said contract which provided that all agreements therein contained or implied were contingent upon accidents, strikes, or other delays unavoidable or beyond the control of the defendant; and in not holding, finding and deciding that the defendant had fully performed said contract on its part.

Sixth. That said Court erred in not holding, find-

ing and deciding that the plaintiffs had extended the time for shipment of said flour to include a shipment made at any time during the month of March, 1912.

Seventh. That said Court erred in holding, finding and deciding that because the defendant did not make shipment of said flour during the month of February, 1912, the plaintiffs were entitled to and did rescind said contract.

Eighth. That said Court erred in holding, finding and deciding that the plaintiffs were entitled to take possession of said flour and to sell it for the account of the defendant.

Ninth. That said Court erred in holding, finding and deciding that the plaintiffs were entitled to recover from the defendant the difference between the contract price of said flour and the net proceeds of [252] the sales of the same by the plaintiffs and that they were also entitled to recover of the defendant interest upon said contract price and their expenditures in handling said flour.

Tenth. That said Court erred in entering judgment against the defendant and in favor of the plaintiffs for the sum of \$3,830.89, United States gold coin, together with costs.

Eleventh. That said Court erred in not holding, finding and deciding that the plaintiffs had accepted said shipment of flour and waived any objection that said shipment was not made on time.

Twelfth. That said Court erred in not holding, finding and deciding that the plaintiffs had not been damaged by the delay, if any there was, in the shipment of said flour.

Thirteenth. That said Court erred in not entering judgment in favor of the defendant and against the plaintiffs.

WHEREFORE, defendant prays that said judgment be reversed.

FLEMING & DAVIES,
Attorneys for Defendant. [253]

In the United States Court for China.

Civil Action No. 118.

Original Paper No. —.

Filed at Shanghai, Nov. 6, 1913. Edward H.
Murray, Acting Clerk of Court.

H. DIEDERICHSEN & COMPANY,
Plaintiffs,

vs.

CONNELL BROTHERS COMPANY, a Corpora-
tion,

Defendants.

Order Allowing Writ of Error.

This sixth day of November, 1913, came the defendant by its attorneys, Fleming and Davies, and filed herein and presented to the Court its petition for the allowance of a writ of error, an assignment of errors intended to be urged by it, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had

as may be proper in the premises.

On consideration whereof, the Court does allow the writ of error upon the defendant giving bond according to law, in the sum of Four Thousand Five Hundred Dollars, United States gold coin, which shall operate as a supersedeas bond.

RUFUS H. THAYER,
Judge of the United States Court for China. [254]

[Writ of Error (Copy).]

*The United States Circuit Court of Appeals for the
Ninth Judicial Circuit.*

Civil Action No. 118.

Original Paper No. —.

Filed at Shanghai, Nov. 6, 1913. Edward H.
Murray, Acting Clerk of Court.

The United States of America,—ss.

The President of the United States of America: To
the Honorable Judge of the United States Court
for China, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said United States Court for China, before you, between H. Diederichsen & Company, plaintiffs, and Connell Brothers Company, a corporation, defendant, a manifest error hath happened, to the great damage of the said Connell Brothers Company, defendant, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if

judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, together with this writ, so that you have the same at San Francisco, in said Circuit, on the sixth day of December next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and [255] according to the laws and customs of the United States should be done.

Witness the Honorable EDWARD D. WHITE,
Chief Justice of the United States, this sixth day of
November, 1913.

Allowed by

RUFUS H. THAYER,

Judge of the United States Court for China.

Attest: EDWARD H. MURRAY,

Acting Clerk of the United States Court for China.

[256]

[Citation on Writ of Error (Copy).]

The United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Civil Action No. 118.

Original Paper No. —.

Filed at Shanghai, Nov. 6, 1913. Edward H. Murray, Acting Clerk of Court.

The United States of America,—ss.

To H. Diederichsen & Company, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, to be holden at the city of San Francisco, in said Circuit, on the sixth day of December next, pursuant to a writ of error filed in the Clerk's office of the United States Court for China, wherein Connell Brothers Company is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable RUFUS H. THAYER, Judge of the United States Court for China, at Shanghai, China, this sixth day of November, 1913.

RUFUS H. THAYER,

Judge of the United States Court for China.

We hereby, this 6th day of November, 1913, accept due personal service of this citation on behalf of H. Diederichsen and Company, defendants in error.

JERNIGAN & FESSENDEN,

Attorneys for Defendants in Error. [257]

In the United States Court for China.

Civil Action No. 118.

Original Paper No. —.

Filed at Shanghai, Nov. 6. 1913. Edward H.
Murray, Acting Clerk of Court.

H. DIEDERICHSEN & COMPANY,

Plaintiffs,

vs.

CONNELL BROTHERS COMPANY, a Corpora-
tion,

Defendant.

**Order Extending Time to File Record in Circuit
Court of Appeals.**

For satisfactory reasons appearing to the Court,
the time for filing the record in this cause in the Cir-
cuit Court of Appeals of the Ninth Judicial Circuit,
pursuant to the writ of error sued out, is extended
until fifth day of January, 1914.

RUFUS H. THAYER,

Judge of the United States Court for China. [258]

In the United States Court for China.

Civil Action No. 118.

Original Paper No. —.

Filed at Shanghai, November 7, 1913. Edward H.
Murray, Acting Clerk of Court.

H. DIEDERICHSEN & COMPANY,
Plaintiffs,

vs.

CONNELL BROTHERS COMPANY, a Corpora-
tion,

Defendant.

Bond on Writ of Error.

Know all men by these presents, that we, Connell Brothers Company, as principal, and Hongkong and Shanghai Banking Corporation, as surety, are held and firmly bound unto H. Diederichsen and Company in the full and just sum of Four Thousand Five Hundred Dollars, United States gold coin, to be paid to the said H. Diederichsen & Company, their certain attorneys, successors or assigns; to which payment, well and truly to be made, we bind ourselves, and our successors jointly and severally firmly by these presents. Sealed with our seals, and dated this seventh day of November, 1913.

Whereas, lately in the United States Court for China, in a suit depending in said court between H. Diederichsen and Company, as plaintiffs, and Connell Brothers Company, as defendant, a judgment was rendered against the said Connell Brothers Company, and the said Connell Brothers Company hav-

ing obtained a writ of error and filed a copy thereof in the Clerk's office of said court to reverse the judgment in the aforesaid suit, and a [259] citation directed to the said H. Diederichsen and Company, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, to be holden at the city of San Francisco, in said Circuit, on the sixth day of December next.

Now, the condition of the above obligation is such, that if the said Connell Brothers Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make the said plea good, then the above obligation to be void; else to remain in full force and virtue.

CONNELL BROTHERS COMPANY,

By Its Attorney in Fact,

J. J. CONNELL. [Seal]

FOR THE HONGKONG & SHANGHAI
BANKING CORPORATION,

By Its Attorney in Fact.

Witness:

WM. S. FLEMING.

November 7, 1913.

Approved:

RUFUS H. THAYER,

Judge. [260]

In the United States Court for China.

Civil Action No. 118.

Original Paper No. —.

Filed at Shanghai Nov. 13, 1913. Edward H. Murray, Acting Clerk of Court.

H. DIEDERICHSEN & COMPANY,

Plaintiffs,

vs.

CONNELL BROTHERS COMPANY, a Corporation,
tion,

Defendant.

Praecipe for Transcript.

To the Clerk of the Above-entitled Court:

You are hereby requested to make a transcript of the record to be filed in the United States Circuit Court of Appeals for the Ninth Judicial Circuit, pursuant to the writ of error allowed in the above-entitled cause and to include in such transcript of record the following and no other papers or exhibits, to-wit:

- 1st. Petition.
- 2d. Answer.
- 3d. Bill of Exceptions.
- 4th. Opinion and Judgment filed June 9th, 1913.
- 5th. Opinion and Judgment filed Nov. 4th, 1913.
- 6th. Petition for Writ of Error.
- 7th. Assignment of Errors.
- 8th. Order Allowing Writ of Error.
- 9th. Writ of Error.
- 10th. Citation and service of same.

- 11th. Order Extending Time to File Record in Circuit Court of Appeals.
12th. Bond on Writ of Error.
13th. Copy of this Praecept. [261]

And file said transcript with the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

FLEMING & DAVIES,
Attorneys for Defendant. [262]

**[Certificate of Clerk United States Court for China
to Transcript of Record].**

Shanghai,
China,—ss.

In pursuance of the command of the writ of error within I, Edward H. Murray, Acting Clerk of the United States Court for China, herewith transmit a true copy of the record, bill of exceptions, assignment of errors and all proceedings in this case of H. Diederichsen and Company, plaintiffs, versus Connell Brothers Company, a corporation, defendant, lately pending in the United States Court for China, under my hand and the Seal of said Court.

Witness my official signature and the seal of said United States Court for China at the City of Shanghai, within the jurisdiction of said court this 22d day of November, 1913.

[Seal] EDWARD H. MURRAY,
Acting Clerk of the United States Court for China.
[263]

[Endorsed]: No. 2361. United States Circuit Court of Appeals for the Ninth Circuit. Connell Brothers Company, a Corporation, Plaintiff in Error, vs. H. Diederichsen & Company, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Court for China.

Received December 15, 1913.

F. D. MONCKTON,
Clerk.

Filed December 29, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

THE CONNELL BROTHERS COMPANY,
a corporation,
Plaintiff in Error,
VS.

DIEDERICHSEN & COMPANY,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR

STATEMENT OF THE CASE.

This case comes to this court by writ of error from the United States Court for China, for review of a decision and judgment of that court against the plaintiff in error for the amount of \$3,830.89, United States currency, and costs.

The only pleadings in the case are a petition and the defendant's answer.

There was a preliminary trial in the court below for determination of a question raised as to, wheth-

er or not there had been any breach of a contract on the part of the defendant, entitling the plaintiff to recover damages, and the decision of the court being adverse to the defendant, the case was submitted on a second trial for determination of the question as to the amount of damages to be awarded to the plaintiff, and thereupon the court rendered its judgment, for the amount above specified.

Facts.

1. The petition alleges the plaintiff to be a "a German firm or company doing business at Chefoo and Shanghai, China, and elsewhere" (Record, p.) and there is not anywhere in the record any other identification of the party prosecuting the case.

2. The defendant is a corporation of the State of Washington having agencies and carrying on business, principally as a flour merchant, at Shanghai, China, and other places in Oriental countries.

3. On the 17th of October, 1911, negotiations between Diederichsen & Company and the defendant culminated in the signing by the defendant of a written memorandum of sale, which being analyzed and reduced to its elements is a mere unilateral agreement for a sale and shipment of merchandise, on terms and conditions as follows:

(a) The subject of the contract is the sale of 80,000 sacks of flour.

(b) The parties are the defendant as vendor and Diederichsen & Company as vendee.

(c) Shipment of the flour was to be on a steamer sailing from Tacoma, or one of several other specified ports, during the month of February, 1912.

(d) The terms of the contract was to be confirmed by a banker's letter of credit on a draft with interest, payable at three days sight, the payor of the draft to be protected by delivery of documents.

(e) The flour was to be shipped for the account of the buyers and carried at their risk.

(f) All agreements in the contract are "contingent upon strikes, accidents and other delays unavoidable or beyond vendor's control."

(g) The quantity and quality of flour was to be 80,000 sacks, each containing forty-nine pounds of American flour equal to what is known under the brand "Morjon."

(h) The price specified is in gold at \$4.15 per four bags, that price covering cost, insurance and freight to Chefoo.

(i) Insurance to cover sound delivery was to be effected by the vendor for the benefit of the consignees. Stipulation Record, p. 44
Exhibit A., p. 250-1.

4. On December 30, 1911, in apparent confirmation of said contract the defendant received at

Seattle a letter dated December 27, 1911, from Wells Fargo Nevada National Bank of San Francisco, stating in effect that said bank was prepared to negotiate a draft on Diederichsen & Company of Chefoo to the extent of \$83,000.00 in gold against shipment of 80,000 sacks of flour to Chefoo, the shipment to be in February or March, 1912, the drafts to be drawn at three days' sight, without recourse to drawer, and to be accompanied by documents to protect payment as follows: Invoices; Policy of marine insurance; Full sets of bills of lading to be made out to order and endorsed in blank; this authority to remain in force to May 1st, 1912; and that the Seattle National Bank of Seattle, Washington, had been informed of this authority. (Record, p. 57....., Exhibit 16.)

On January 3, 1912, in further confirmation of said contract, the defendant received a letter from the Seattle National Bank, the substantial part of which is as follows:

“We are in receipt of a letter from our San Francisco correspondent, the Wells Fargo Nevada National Bank, requesting us to negotiate your three days' sight drafts on Diederichsen Co., Chefoo, covering shipment of 80,000 bags of flour, as per instructions in their letter of the 27th inst., addressed to you, of which they have sent us a copy.” (Record, p., Exhibit 17.)

5. On December 29, 1911, acting on information

that the Steamship "Indien," then supposed to be at or near Buenos Ayres, would be due and discharged at San Francisco in February between the 15th and the 20th, the defendant chartered her for the transportation of said 80,000 bags of flour from Tacoma to Chefoo. (Testimony of Ostrander, pp. Exhibits, 3 to 15, inclusive and 22.)

6. About January 25, 1912, on information that the "Indien" had been detained for repairs on account of breakage of her machinery, the defendant arranged for the shipment of the flour on the Steamship "Harpagus," to be loaded at Tacoma not later than February 25, 1912. (Testimony of M. P. Connell, pp.) (Testimony of Bau-
mann, pp. 22-28)

7. The "Harpagus" arrived at the Puget Sound Navy Yard, February 15, 1912, and discharged there her cargo of coal, but was detained so that she did not arrive at Tacoma until February 29, 1912. (Testimony of Haines, p.)

8. The entire 80,000 sacks of flour was on the dock at Tacoma ready to be put on the vessel on the 21st day of February, 1912. (Testimony of Bau-
mann, p. Testimony of Bibb, p.)

9. Warehouse receipts for the flour were delivered to an agent having control of the "Harpagus," and thereupon on the 28th day of February, 1912, a bill of lading was issued for the flour, whereby said agent acknowledged to have received said flour—"for shipment at Tacoma to Steamship 'Harpagus' or any other steamship of the North-

ern Pacific Steamship Company." * * * to be carried by said steamer or any other steamer of the above company to the port of Chefoo "or as nearly thereto as she or they may safely go," with liberty to call at any port or ports in or out of the customary route "in any order, and to be delivered there to order." (Testimony of Haines, p. Exhibit No. 1.)

10. On the said 28th day of February, 1912, the defendant endorsed said bill of lading in blank and delivered the same, together with the other documents required to conform to the specifications in the letter of the Wells Fargo Nevada National Bank of San Francisco, and a three days' sight draft for \$83,000.00 in gold on Diederichsen & Company, without recourse to the drawer, to the Seattle National Bank, and received payment in full for the agreed price of said flour, to-wit: \$83,000.00 in gold. (Testimony of M. J. Connell, p.)

11. The "Harpagus" commenced receiving the consignment of flour on the 1st day of March, 1912, and thereafter received other merchandise to complete her cargo at Tacoma, and departed therefrom on the 8th day of March, 1912. (Testimony of Haines, pp. ~~25~~ 26....)

12. April 8th, 1912, Diederichsen & Company telegraphed to the defendant's office in Shanghai, saying:

"Harpagus we are informed sailed Puget Sound 14th day of March. We must hold you responsible for non-performance of contract.

Buyers making heavy claims or will refuse the goods. Communicate with our Shanghai office." (Exhibit B., p. 482.)

13. On receipt of that message an agent of the defendant called at the office of Diederichsen & Company in Shanghai and verbally denied responsibility and asserted that the contract had been performed. No other response to the message was made. (Testimony of J. J. Connell, p. 117.)

14. April 10th, 1912, Diederichsen & Company filed with the American Consul at Chefoo a protest in the following words:

"We beg to file with the U. S. Consulate, a protest against our payment made yesterday in settlement of Messrs. Connell Bros. Company's draft amounting to gold, \$83,000 (drawn on us against 80,000 bags of American flour per S. S. 'Harpagus') for non-fulfilment of contract (dated the 17th day of October, 1911), and reserve ourselves the right to hold Messrs. Connell Bros. Company responsible for all claims which will arise in consequence of violation of this contract." (Exhibit D, p. 118.)

15. The "Harpagus" arrived at Chefoo on the 16th day of April, 1912, and discharged said flour and delivered all of it there to Diederichsen & Company. (Testimony of Gracher, pp. 119-120.)

16. April 17th, 1912, Diederichsen & Company telegraphed to the defendant's office at Shanghai saying:

“ ‘Harpagus’ arrived. Consignee’s buyers refuse to receive the goods. Is at your disposal.” (Exhibit C, p. 183.)

17. On receipt of that telegram an agent of the defendant called at the Shanghai office of Diedrichsen & Company and disclaimed any interest in the flour. (Testimony of J. J. Connell, p. 191.)

18. On different dates between May 24 and September 23, 1912, Diederichsen & Company sold said flour in lots and received the proceeds amounting to the aggregate sum (net) of 117,121.76 Taels. (Testimony of Graeber, pp. 127-8 Exhibit I, p. 182.)

19. Diederichsen & Company paid storage charges and expenses of transacting the business, the gross amount of which is not disputed. (Testimony of Graeber, pp. 136.)

20. On the 2nd day of February, 1912, the market price of flour delivered in China was about \$4.07½ c. i. f. per barrel of four sacks, in gold money, and from that time there was a gradual and steady increase of the market price of flour in gold until the date of the arrival of the “Harpagus,” April 16, 1912, at Chefoo, at which date the gold price was \$4.37½ per barrel. (Testimony of J. J. Connell, pp. 195-7. Testimony of Britt, pp. 236-7. Exhibit 1A, p. 248.)

21. From November, 1911, until February, 1912, the market price of flour in China measured by Chinese current money steadily declined and in

March and April, 1912, the market prices, per bag, in gold and in Chinese taels were as follows:

March	1	Gold	.....\$1.04 ⁺
"	"	Taels	..... 1.63
"	15	Gold	.....\$1.04 ⁺
"	"	Taels	..... 1.64
"	25	Gold	.....\$1.05
"	"	Taels	..... 1.66
April	1	Gold	.....\$1.05 ⁺
"	"	Taels	..... 1.66
"	13	Gold	.....\$1.09 ⁺
"	"	Taels	..... 1.72
"	26	Gold	.....\$1.09 ⁺
"	"	Taels	..... 1.67

(Testimony of J. J. Connell, pp.193.... Testimony of Britt, pp.231.... Exhibit 1A, p. 248..)

22. In addition to the price of \$83,000.00 in gold paid for the flour at Seattle, Diederichsen & Company paid interest to the bank for negotiating the draft. (Testimony of Graeber, p. 154-6 Exhibit E, p. 185. Exhibit G, p. 185.) The amount actually paid is something in excess of the amount which would have accrued according to the customary method of fixing the price of flour, to the importer in China, by adding two per cent to the actual price paid on the American side for interest.

23. By a pre-arrangement with the Russo-Asiatic Bank the rate of exchange between gold money and Chinese currency was fixed for this transaction at

1 Tael = 58 cents gold. (Testimony of Graeber, p. ~~189~~ Exhibit G, p. ~~185~~.)

A computation of the cost of the flour, with interest reduced to Chinese money, shows the actual cost of the flour to Diederichsen & Company to be 1.834^{+T.} per bag, and the stipulated price in their resale contract per Exhibit H, p. ~~186~~, was 1.832^{+T.}

24. In March and April, 1912, the market in China was overstocked and flour was purchaseable in large quantities at a price lower than the market quotations. (Testimony of J. J. Connell, pp. ~~194-5~~ Testimony of Britt, pp. ~~141-3~~ Exhibit 1A, p. ~~248~~.)

25. The petition states the grounds on which the action is based to be a breach of the contract in one particular only, viz: that the carrying steamer did not sail from Tacoma, in the month of February nor until the 14th day of March, 1912. And that the vendee suffered a heavy loss as a consequence of said delay in this: that having made a contract to re-sell 75,000 sacks of said flour, and being unable to make delivery thereof in accordance with said contract to re-sell, the purchasers for that cause cancelled their agreements to purchase that quantity of flour. (Record, p. ~~3~~.)

26. To prove the loss as alleged in the petition there was introduced in evidence a written contract whereby Diederichsen & Company agreed to sell 70,000 sacks of "Morjon" flour to be delivered

in March or April, 1912 (Exhibit H, p. ~~84~~ 85), and there was a total failure to prove any contract to re-sell part of the particular flour purchased from the defendant, nor any flour shipped or to be shipped on a steamer sailing from any port within any specified time.

To comply with the rules, all the questions in the case are here stated, although the court may not deem it necessary to consider more than one.

First. Can any judgment, except for dismissal, be rendered in an action not prosecuted by a person in being?

Second. Is the memorandum signed in behalf of the defendant a contract complete in itself?

Third. If said memorandum is a complete and valid contract, are the words in its contingency clause, "and other delays unavoidable or beyond our control," effective or meaningless?

Fourth. Was the stipulation in the memorandum as to the time of sailing modified by the banker's letter of credit?

Fifth. Did acceptance of the bill of lading and other documents and payment for the flour by the bank at Seattle close the transaction in such manner as to estop the vendee from asserting a right, to rescind the contract?

Sixth. Did the vendee by the petition in this action elect to pursue a remedy inconsistent with rescission of the contract?

Seventh. Under the legal rule for measuring

damages applicable in this action, does the evidence justify an award of any damages for mere failure of the carrying steamer to sail from the loading port in February?

The following assignments of error are relied upon:

First. That said Court erred in striking from the deposition of A. S. Haines, a witness for the plaintiffs, and refusing to receive in evidence the following testimony given during the cross-examination of said witness, to-wit: "We had continuous correspondence with the Centennial Mill Company, which I read over this morning, showing that we advised them from time to time of the arrival of the boat, the progress of the discharge, and assuring them that we still expected to load the flour in February; and as the dates progressed we finally informed them it would be the 1st of March when we loaded the flour," with the exception of the words, "We still expected to load the flour in February."

Second. That said Court erred in striking from the deposition of M. J. Connell, a witness for the defendant, and refusing to receive in evidence portions of the testimony, given during the direct examination of said witness, which testimony was in substance as follows: That it was not within the power of the defendant to have avoided the delay in the arrival of the Steamship "Indien" on Puget Sound for the purpose of taking on the shipment of flour. That the reason why the clause

“All agreements herein contained or implied are contingent upon strikes, accidents and other delays unavoidable or beyond our control” was included in all orders for merchandise to be shipped by the defendant to the Orient, was that the defendant had no control over the steamships and could only ship as the steamships sailed. That said clause was inserted in all orders for merchandise shipped to ports to which no regular lines of steamers operated, and that an exporter from Puget Sound handling a product such as flour upon orders for shipment to ports in the Orient to which no regular line of steamships operated could not conduct an export business unless such a clause was inserted in their agreements.

Third. That said Court erred in striking from the deposition of L. P. Baumann, a witness for the defendant, and refusing to receive in evidence portions of the testimony given during the direct examination of said witness, which testimony was in substance as follows: That there was nothing within the power of the Centennial Mill Company to have been done, after they had chartered first the “Indien” and later the “Harpagus” to have avoided the delay to the “Indien” in the first place or the delay of the “Harpagus” in the second place; and that there was no way in which the Centennial Mill Company could have controlled the movements of these vessels so as to have caused either of them to arrive at Tacoma for the purpose of taking on the flour at the due date.

Fourth. That said Court erred in holding, finding and deciding that the defendant had committed such a breach of the terms of the contract between the plaintiffs and the defendant as to the shipment of the flour mentioned therein as would render the defendant liable to the plaintiffs in damages if damages had in fact been sustained by the plaintiffs.

Fifth. That said Court erred in not holding and deciding that the delay in the shipment of said flour was due to causes over which the defendant had no control and that said delay was within the exception in said contract which provided that all agreements therein contained or implied were contingent upon accidents, strikes, or other delays unavoidable or beyond the control of the defendant; and in not holding, finding and deciding that the defendant had fully performed said contract on its part.

Sixth. That said Court erred in not holding, finding and deciding that the plaintiffs had extended the time for shipment of said flour to include a shipment made at any time during the month of March, 1912.

Seventh. That said Court erred in holding finding and deciding that because the defendant did not make shipment of said flour during the month of February, 1912, the plaintiffs were entitled to and did rescind said contract.

Eighth. That said Court erred in holding, finding and deciding that the plaintiffs were entitled

to take possession of said flour and to sell it for the account of the defendant.

Ninth. That said Court erred in holding, finding and deciding that the plaintiffs were entitled to recover from the defendant the difference between the contract price of said flour and the net proceeds of the sales of the same by the plaintiffs and that they were also entitled to recover of the defendant interest upon said contract price and their expenditures in handling said flour.

Tenth. That said Court erred in entering judgment against the defendant and in favor of the plaintiff for the sum of \$3,830.89, United States Gold Coin, together with costs.

Eleventh. That said Court erred in not holding, finding and deciding that the plaintiffs had accepted said shipment of flour and waived any objection on the ground that said shipment was not made on time.

Twelfth. That said Court erred in not holding, finding and deciding that the plaintiffs had not been damaged by the delay, if any there was, in the shipment of said flour.

Thirteenth. That said Court erred in not entering judgment in favor of the defendant and against the plaintiffs.

The plaintiff in error affirms the following propositions:

I.

There is no party appearing to prosecute or maintain this action. The court cannot render a

judgment for, or against, an aggregation of unidentified persons not authorized, by a statute, to sue in a corporate or firm name.

II.

The memorandum signed by the defendant was without any consideration and did not become a contract, until confirmed by Diederichsen & Company, by establishing a banker's credit for payment of the contract price for the flour to be shipped, and the terms of the contract can only be ascertained by a true interpretation, of said memorandum together with the letter of the Wells Fargo Nevada National Bank of San Francisco, specifying the conditions on which the vendor's draft for the price of the flour would be honored.

III.

The completed contract to which the parties mutually assented and became bound, was for a cash sale to be consummated by delivery of the flour to the carrier, consigned as specified, and paid for on delivery of the bill of lading with accompanying documents.

IV.

The only issue as to non-performance of the contract, or breach thereof on the part of the vendor, tendered by the petition, is in the allegation that the carrying vessel did not sail within the month of February. This is immaterial for the reason that there was no formal acceptance of the contract in the terms of the memorandum specifying

the time of sailing, and the contract when made definite and binding by the banker's letter, extended the limitation of time of sailing to include the months of February and March.

V.

By necessary implication the Seattle National Bank, was constituted agent for the vendee to receive the documents constituting evidence of ownership of the flour and make the required payment. Delivery of the bill of lading was in law, delivery of the flour, and payment of the purchase price on draft, made without recourse, closed the transaction.

VI.

After acceptance of the flour and payment of the purchase price, the vendee could not rescind the contract and reclaim the purchase money, except on the ground of fraud or mistake, which would have to be alleged and proven, to establish a right to do so in an action at law.

VII.

The petition does not charge the defendant with the commission of any fraud, nor allege a mistake on the part of either party with respect to the sailing date of the "Harpagus," and there is no evidence tending to prove either fraud or mistake.

VIII.

The bill of lading contained the only information with respect to the time of shipment of the flour

communicated to the vendee or its agent, at the time of or previous to the payment; and that information was not in any particular false or misleading.

IX.

The defendant was diligent in endeavoring to perform its contract within the time limited for performance and is protected against any claim for alleged delay in the sailing of the carrying steamer by the contingency clause in the contract.

X.

Diederichsen & Company suffered no loss by the alleged delay in shipment. When they received the flour in April its market value, whether measured in gold money or Chinese currency was higher than it was on any day in March; hence they were not damaged by decline in its market value. They suffered no loss of profits by action of their vendees in cancelling the alleged contract for re-sale of part of the flour, because the stipulated price in the re-sale contract, Exhibit H, was only equal to the price they paid at Seattle with the added interest which they were required to pay to their banker.

XI.

Diederichsen & Company were not held liable for damages for any breach of their alleged re-sale contract; and if it had been necessary for them to protect themselves against a claim to deliver in March, they could have done so, and made

a profit by purchasing other flour at the then market price.

ARGUMENT.

First.

The first point challenging attention is stated in our first proposition and going, as it does, to the jurisdiction of the court we maintain that it is covered by the ninth and tenth assignments of error, but there is such plain error that, whether assigned or not the court must notice it and order the judgment reversed and the action dismissed.

It is elementary law that there can be no action unless there is some person in existence capable of suing who seeks redress, and an adverse party capable of being sued.

I Enc. L. & Pr. 1078.

It is also elementary law that, a partnership or firm is not a legal entity and not a person, natural or artificial, having the right to invoke the jurisdiction of a court by an action in its firm name, without joinder of the individuals composing it.

Story on Partnership, 7th Ed., Secs. 241-2.

15 Enc. of Pl. & Pr., 476-839.

22 Am. & Eng. Encyc. of Law, 2nd Ed. 75.

Proprietors of Mexican Mill vs. Yellow Jacket Silver Mining Co., 4 Nev. 40; 97 Am. Dec. 510;

The St. Paul Hippothetae vs. St. Paul Bookbinders Union, (Minn.) 102 N. W. 725.

The first paragraph of the petition alleging: "That the plaintiff is a German firm or company doing business at Chefoo, and Shanghai, China, and elsewhere," is put in issue by the answer, and there is no evidence tending to prove the organization of an aggregation of persons constituting a firm or company, and the record in its entirety fails to disclose the names of any individuals responsible for the prosecution of the action or against whom an adverse judgment may be rendered.

Roberts vs. Lewis, 144 U. S. 653, 36 L. Ed. 579,
12 Sup. Ct. Rep. 781;
Chase vs. Wetzlar, 225 U. S. 79, 56 L. Ed. 990.

Second.

Our second, third and fourth propositions are covered by the fourth and sixth assignments of error. To make a valid contract requires assent of the parties to the extent that, the minds of the contracting parties must meet and agree to do or not to do a specific thing, therefore the memorandum signed only in behalf of the plaintiff in error is not of itself a contract, because, there is no evidence that the vendee assented to its terms by acceptance of it, otherwise than by accepting the bill of lading and paying for the flour, unless the notice from the Wells Fargo Nevada National Bank of San Francisco constituted an acceptance, with a modification of terms as to the time of sailing of the carrying steamer.

If the memorandum was accepted as a contract in any other manner, the vendee must be held bound to strict compliance with the important stipulation therein, requiring the establishment of a banker's credit for payment. That being a condition precedent, the vendor could not be held liable for breach of the contract until the banker's credit had been established, and there is a necessary implication that the bank acted as agent for the vendee to receive the bill of lading and pay for the flour.

Merchant's Exchange Bank vs. McGraw, 59
Fed. Rep. 972; S. C. 76 Fed. Rep. 930.

The agent's acceptance of the documents constituted a waiver of any stipulation in the memorandum as to the sailing date of the carrying steamer. That is so because, the bill of lading itself disclosed that the flour had not been shipped on a steamer sailing within the month of February.

By its answer the defendant specifically admitted the fourth paragraph of the petition, alleging as a mere legal conclusion that, by the terms and conditions of the contract the defendant undertook and agreed to ship the flour by a steamer sailing during the month of February, 1912. Parties are only bound by their pleadings in so far as they state material facts, and they are not bound by statements of mere conclusion of law, when the adverse party or the court cannot be misled thereby. In this case the court, will give to the memorandum a true construction and determine the legal questions

arising therefrom. By fair consideration given to the pleadings in their entirety, it will appear that the answer is not misleading, it cannot be so, because, it sets forth the memorandum in question in *haec verba*.

Whatever imperfections there may be in the answer are more than counterbalanced by deficiencies in the petition, which in its entirety sets forth an executory contract of sale, made in writing; without stating in full all the terms and conditions of the contract and without alleging that the writing was delivered or accepted; nor that the plaintiffs paid for the flour, or assumed any obligation to pay; nor that they ever performed on their part any conditions pre-requisite to a right to complain of non-performance on the part of the defendant. The case having been tried on defective pleadings the Appellate Court can only ascertain and determine the rights of the parties by giving consideration to the evidence and the whole record.

Third.

Our fifth proposition is also covered by the sixth assignment of error. The defendant's draft for \$83,000.00 was not protested for non-acceptance or non-payment and by honoring it and receiving the documents which accompanied it, entitling them to possession of the flour, and actually receiving the flour when discharged from the "Harpagus," Diedrichsen & Company necessarily and in fact con-

firmed the agency of the bank to receive said documents and make payment for the flour, whereby the transaction was closed. The case does not rest upon any assumed waiver of an actual breach of warranty which the contract contained, nor of ratification of an act under assumed authority not previously conferred. The draft being without recourse to the drawer and accompanied by a bill of lading which contained information of the only fact complained of as constituting a breach of warranty, there is a necessary and conclusive presumption that the bank acted within authority previously conferred, because the transaction cannot be explained in any other way and there has been no attempt to prove by evidence that the bank acted without authority previously given, nor in excess of authority conferred.

Diederichsen & Company paid the draft under protest, but their protest was an irregular proceeding, upon which no rights could be founded or saved. They did not protest on the ground that the draft had been negotiated without their authority, their complaint being "for non-fulfilment of contract, dated the 17th day of October, 1911." If that were a valid ground for non-acceptance or non-payment of the draft, the business-like method of dealing with the situation would have been for Diederichsen & Company to have refused to accept the draft, and that would have entitled the holder to the rights of an owner or pledgee of the flour. Moore on Carriers, p. 172.

Fourth.

Our sixth, seventh, and eighth propositions are covered by the seventh, eighth, ninth and eleventh assignments of error. The petition sets forth only a claim for damages on the ground of a breach of warranty in the contract, it does not allege that Diederichsen & Company claimed the right to, or did rescind the contract. The pretense of a rescission of the contract upon which the court below seems to have based its decision is plainly an afterthought and we maintain is groundless.

The right to rescind a contract for breach of a warranty therein, is governed by a general rule, limiting the right of rescission, after complete performance of an executory contract. The right to rescind is founded in reason, and the grounds upon which it must be based are identical with the grounds which support the right to insist upon strict performance of the terms of a contract. It is a right, however, which may be waived and by the general rule acceptance of the benefits of a contract does waive strict performance of all of its terms.

Atlantic Delaine Co. vs. James, 94 U. S. 207,
Law Ed. Book 24, p. 112.

Monroe Water Co. vs. Monroe, 110 Wis. 11;
Johnson vs. Oppenheim, 55 N. Y. 280, 291;
29 Am. & Eng. Enc. of Law, 2nd. Ed. 1104,
1106;

Reichel vs. Jeffrey, 9 Wash. 250, 252.

In this case the court below sustained the right to rescind, although not claimed in the petition, by erroneously assuming, as a fact, that presentation of the bill of lading amounted to misinformation as to the time of the sailing of the carrying steamer, and that acceptance of the flour on the part of Diederichsen & Company was induced by creating a false supposition that the stipulation in the memorandum, for shipment by a steamer sailing within the month of February, had been complied with.

The leading authority relied upon to sustain the decision of the court, is the case of *Norrington vs. Wright*, 115 U. S. 198, 6 Sup. Ct. 12, 29 L. Ed. 366, which holds that in mercantile transactions, a stipulated time of delivery is essence of a contract of sale.

That was an action brought *by the vendor*, to collect payment for a quantity of iron sold under a contract for successive deliveries through a period of six months. The first delivery of a comparatively small quantity having been accepted and paid for, without knowledge of any deficiency in shipments during the first two months, the vendee upon being apprised of deficiencies and while the contract was still executory, refused to accept subsequent shipments. The Supreme Court decided that the defendant had the legal right to rescind the contract *by acting promptly* in giving notice, notwithstanding acceptance of the first shipment.

In view of the important facts on which that

decision was based, it is not opposed to the defense in this case on the ground that acceptance of performance of a contract of sale by a vendee, having information such as in this case the bill of lading contained, and payment of the purchase money closes the transaction and estops the vendee from asserting a right to reclaim the money because of mere delay in shipment of goods. We insist that the only bearing that case can have upon the questions in this case, is to emphasize the distinction between a vendor's action to enforce an executory contract, notwithstanding a breach on his part of a warranty therein, and an action by a vendee to rescind an executed contract and reclaim money paid.

The most recent decision following the case of *Norrington vs. Wright* is the case of *Roxford Knitting Co. vs. Hamilton Mfg. Co.*, 205 Fed. Rep. 842, in which the Circuit Court of Appeals for the Third Circuit, in an action by a vendor to recover the price of merchandise sold under a single unitary contract providing for successive deliveries, where, after acceptance of part of the goods, the vendee discovered latent defects in the quality and refused to accept subsequent deliveries, upheld the right to rescind. The decision lays particular stress upon the condition of promptness in repudiating the contract, as an essential to the right of rescission, even where the right was asserted while the contract was still executory.

If there had been a breach of the contract on the

part of the defendant in this case, by delay in shipment of the flour and if acceptance of the bill of lading and payment had been without knowledge or means of knowledge on the part of the vendee, the right to rescind the contract and re-claim the purchase money would not have been the only remedy, for the law would entitle the vendee to exercise an option to rescind the contract or to retain the flour and sue for damages. Mere delay to exercise the option in such a case estops the vendee from claiming a release from his obligation to receive and pay for the goods.

McDonald vs. Kansas City Bolt & Nut Co.,
149 Fed. 360, 79 C. C. A. 298, 8 L. R. A.
(N. S.) 1110.

In this case the option has been exercised, by instituting this action to recover damages, the case must be adjudicated under the law applicable to actions for damages, that is to say, the vendee must prove a breach of the contract and resulting damage, and the compensation recoverable must be according to the measure of damages established by the law applicable to cases of delay in the delivery of merchandise sold, that is, the difference between the contract price and the market price at the time and place fixed by the contract for delivery.

In the *Alexander Gibson* case, 56 Fed. Rptr. 603, by reason of a controversy between the master of the ship and the charterer, there was delay in loading the vessel which had been chartered for trans-

portation of a cargo of wheat from Tacoma to Liverpool, for a period of about a month, during which time the market price of wheat in Liverpool declined. The action was thereupon brought by the charterer to recover damages sustained by reason of such decline in the value of the cargo of wheat. The suit was dismissed by the United States District Court, and on an appeal to the United States Circuit Court, which then had jurisdiction of appeals, the judgment of the District Court was reversed by Judge Sawyer, and a judgment was rendered in favor of the libellant for the damages caused by a decline of 1s. 6d. per quarter in the market price of wheat during the period of detention, and the judgment of the Circuit Court was afterwards affirmed by this court. We maintain that, for this Circuit, that decision establishes a general rule, that the measure of damages recoverable for delay in shipment of a cargo, is to be determined by reference to the fluctuations in the market price of the cargo, *during the period of detention*. This is on a theory that, if the market declines so that the owner of the cargo suffers a loss in its value, his loss by reason of diminished value is equivalent to the decline in market quotations during the period of wrongful detention. On a rising market he cannot be damaged, because his property has a higher commercial value after termination of the period of delay than it would have at the stipulated time for shipment.

To make a case for recovery of *special damages*

by a vendee, within an exception to the general rule, it is necessary to plead the particular facts causing special damage; and when that is done the plaintiff must win or fail to win, by success in proving the allegations of his pleading, or failure to do so. In case of failure he cannot recover damages on general principles.

This is not an action to recover damages under the general rule. The petition contains no statement of the market price of flour, at any time or place, and does not allege that there was a decline in the market price during the period of the alleged delay in shipment. There is no issue for the court to decide with respect to market price or a loss sustained, as a consequence of fluctuations in the price of flour.

The special facts pleaded as grounds for claiming damages are a contract to re-sell part of the flour; inability to fulfill the contract by reason of delay in shipment; refusal of the proposed purchasers to accept delivery, and loss by having to sell the flour in the open market "at the then prevailing market price."

From the fact that, the court did not base its decision upon the facts alleged in the petition, it may be fairly inferred that there was a failure of proof. We do not, however, rest the case for reversal upon a mere inference. The evidence certified to this court shows affirmatively facts and conditions contrary to the allegations of the petition in the particulars specified.

Exhibit "H" is the alleged contract of re-sale. It was written in Chinese and according to the best interpretation obtainable it stipulates for delivery within or after the month of March, the meaning of it being that delivery should be within the month of March or afterwards, but not after April. (Testimony of Ho Lien Shen, p. 160. Testimony of Ney, p. 161-162) As the "Harpagus" arrived at Chefoo on the 16th day of April, 1912, Diederichsen & Company were in a position to make delivery within the time stipulated and enforce their contract if it were otherwise enforceable, and as appears by the evidence, they did endeavor to enforce the contract against their vendees, and the reason for their failure is that the vendees were insolvent. (Testimony of Graeber, p. 131-146) Therefore, if they had suffered any loss by reason of the refusal of their vendees to accept delivery it was wholly due to conditions other than delay in shipment of the flour at Tacoma, and the court below committed a reversible error in taxing the defendant with the difference between the cost of the flour to them and the net proceeds realized from the sales thereof.

Fifth.

Our ninth proposition is based upon the first, second, third, fourth and fifth assignments of error.

We maintain that the memorandum of sale signed by the defendant does not contain an absolute

warranty as to the time of shipment. The stipulation therein that the flour should be shipped by steamer sailing from one of the designated ports within the month of February is controlled by the stipulation that, the contract was made contingent upon strikes, accidents or other delays unavoidable or beyond the control of the vendor. The memorandum was written in view of the well known fact that there are no lines of steamers running on schedule time between ports on the American side of the Pacific Ocean and Chefoo and the obvious impossibility of shippers to control the sailing dates of vessels which could be employed for transportation of the flour to the designated port of discharge. (Testimony of M. J. Connell, p. 20-1. Testimony of Baumann, p. 81-2-5) The defendant was entitled to prove what difficulties were encountered and the degree of diligence on its part in endeavoring to make the shipment within the stipulated time.

The defendant was not obligated to charter a vessel previous to compliance on the part of Diedrichsen & Company with the requirement in the memorandum for banker's credit which would insure payment for the flour, and is not chargeable with negligence by reason of failure to charter a vessel previous to the 30th day of December, 1911, on which date notice was received that the Seattle National Bank would take care of its draft for \$83,000.00, without recourse. At that time steamers for the carrying of merchandise across the Pa-

cific Ocean were scarce and hard to secure, (Testimony of Haines, p.) and the best arrangement that could be made in the light of the most reliable information obtainable was made by chartering the Steamship "Indien," which was expected to arrive at Tacoma, in the month of February, 1912, and it was not until late in January that the defendant was advised that she had been detained by breakage of her machinery. (Testimony of Ostrander, pp. ~~51~~ ⁵¹ - ~~51~~ ⁵¹. Exhibit ~~14~~ ¹⁵, p. ~~96~~ ⁹⁶...) Then the defendant acted promptly and the best arrangement that could be made was to arrange for space in the Steamship "Harpagus," which was expected to arrive at Tacoma by a date in February sufficiently early to have taken on board the cargo and sail from that port before the end of the month, and the quantity of flour required to fill the contract was made ready for delivery to the ship by the 21st day of February. That steamer was detained in discharging her cargo of coal at the Puget Sound Navy Yard, so that she did not arrive at Tacoma until the last day of February. Her delay in arrival and departure from Tacoma was a circumstance which could not have been obviated by any effort on the part of the defendant, (Testimony of Haines, p. ~~28~~ ²⁸ - ~~9~~ ⁹) so that literally within the terms of the contingency clause, the delay was unavoidable and not due to any acts of the defendant or circumstances within its control.

The testimony which the court rejected was relevant to the issue, corroborated other testimony

and had a tendency to prove the facts here recited. At the time of the court's ruling, the defendant took exceptions which we now maintain are valid and just cause for reversal of the judgment.

The doctrine of *ejusdem generis*, which was applied by the court below in rendering its interpretation of the memorandum, is not arbitrary nor superior to other rules applicable to the interpretation of contracts, but one of many resorted to for the ascertainment of intent.

U. S. vs. Lawrence, Fed. Cas. No. 15,572.

In adjudicating the rights of parties under written contracts, the object is to interpret and enforce them according to the intentions of the parties. That is to be ascertained by consideration of the words used, and, if it is possible to do so, every sentence and every word must be given some effect. And consideration must be given to the known facts and conditions in view of which the contract was made. We maintain that, in the light of the testimony, the rule of *ejusdem generis*, was unjustly misapplied by the court below in this case and contrary to the great weight of judicial authority in this country as set forth in the decisions of the courts, which lay down the rules for adjudication of rights in civil cases prescribed by the act creating and conferring jurisdiction upon the United States Court for China.

34 U. S. Stat., Sec. 4, p. 815;

U. S. Compiled Statutes (1901) Supt. 1911,
p. 1185.

People vs. Bealoba, 17 Cal. 397;

Ellis vs. Beale, 18 Me. 337, 36 Am. Dec. 726;

Brown's Case, 112 Mass. 409;

Flower vs. Witkovsky, 69 Mich. 371; 37 N.
W. 364;

Brown vs. Corbin, 40 Minn. 508; 42 N. W. 481;

M. A. Seed Dry-Plate Co. vs. Wunderlich,
69 Minn. 288; 72 N. W. 122;

State vs. Board of Education, 54 N. J. L.
313; 23 Atl. 670;

Collins vs. Drew, 67 N. Y. 149;

Cincinnati, etc., Turnpike Co. vs. Neil, 9
Ohio 11;

U. S. vs. Mattlock, Fed. Cas. No. 15, 744;

U. S. vs. Trice, 30 Fed. Rep. 490;

U. S. vs. Albert, 45 Fed. Rep. 552;

Hall vs. State, 48 Wis. 689;

Kentucky vs. Dennison, 24 How. 66, 110;
Law Co-op. Ed. Book 16, p. 717, 730.

Sixth.

Our tenth and eleventh propositions are sustained by uncontradicted evidence, and based upon the ninth, tenth, twelfth and thirteenth assignments of error.

By the uncontradicted evidence it was proved that in China, at the time of the transaction here involved, there was a double standard of money and the rate of exchange was constantly fluctuat-

ing which affected the market price of flour. This is proved by the testimony of Mr. J. J. Connell and William H. Britt, and illustrated by defendant's Exhibit 1A. This matter will be the more readily comprehended by an abbreviation of the table which is here inserted.

February 15, 1912, Rate of Exchange,

Gold, $65\frac{3}{4}$ cts.=1 Tael.

Initial cost to importer, per bbl. in

Gold\$4.171 $\frac{1}{2}$ c. i. f.

With interest added net cost per bag

in Taels 1.62

Selling price at wholesale, per bag in

Taels 1.65

March 15, 1912, Rate of Exchange,

Gold, $64\frac{1}{2}$ cts.=1 Tael.

Initial cost to importer, per bbl., in

Gold\$4.171 $\frac{1}{2}$ c. i. f.

With interest added net cost per bag

in Taels 1.64

Selling price at wholesale, per bag in

Taels 1.63

April 13, 1912, Rate of Exchange,

Gold, $64\frac{3}{8}$ cts.=1 Tael.

Initial cost to importer, per bbl., in

Gold\$4.371 $\frac{1}{2}$ c. i. f.

With interest added net cost per bag

in Taels 1.72

Selling price at wholesale, per bag in

Taels 1.621 $\frac{1}{2}$

April 26, 1912, Rate of Exchange,

Gold, $66\frac{1}{8}$ cts.=1 Tael.

Initial cost to importer, per bbl. in

Gold $\$4.37\frac{1}{2}$ c. i. f.

With interest added net cost per bag

in Taels 1.67

Selling price at wholesale, per bag in

Taels $1.62\frac{1}{2}$

From the 25th of March to the 26th of April, 1912, the price of flour in China advanced so that instead of suffering a loss by diminished value of 80,000 sacks of flour purchased from the defendant, Diederichsen & Company made a substantial gain, the price having risen from $\$4.22\frac{1}{2}$ per barrel c. i. f., which means cost, insurance and freight, to $\$4.37\frac{1}{2}$ per barrel c. i. f., amounting to $\$3,000.00$, the prices in Taels being 1.66 March 25th and 1.67 April 26th; therefore they have no legal claim for damages recoverable under the general rule.

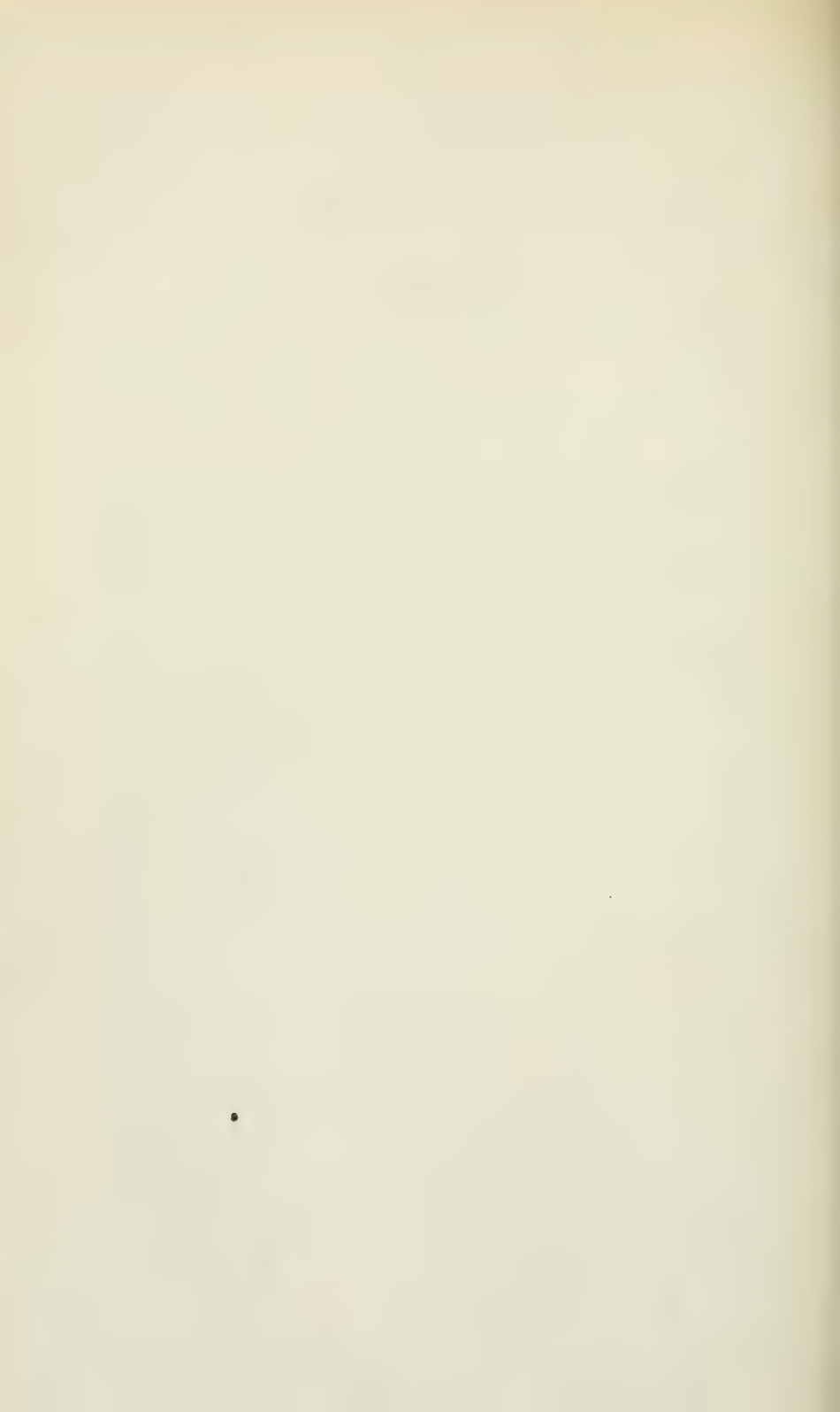
On the other hand during the same period, as the evidence shows, the market in China was well stocked with flour, and the selling price in large quantities 1.63 Taels per sack, March 25th and $1.62\frac{1}{2}$ Taels, April 1, so that if it had been necessary for Diederichsen & Company to buy flour in the open market for delivery within the month of March, they would not have suffered any loss by having to pay a price higher than the contract price which they paid for the 80,000 sacks pur-

chased from the defendant, nor the price stipulated in their re-sale contract.

Finally there was no loss of profits by failure of the vendees in the re-sale contract to accept and pay for the 70,000 bags at the price stipulated, which was at the rate of 1.832 Taels per bag. Whereas, the cost price of the flour to Diederichsen & Company, including the amount of interest which they actually paid to their banker was at the rate of 1.834 Taels per bag. And if they had only paid interest at the rate of two per cent the small margin of profit would have been more than consumed by the cost of handling necessary to make delivery.

Having suffered no loss attributable to the alleged breach of the defendant's contract, Diederichsen & Company have no cause of action against the plaintiff in error and a retrial of the case in the court below would be fruitless, unless a real party plaintiff might come into the case and assume liability for costs. Waiving that possible benefit we ask for reversal of the judgment and for a mandate directing that the case be dismissed.

KERR & McCORD,
FLEMING & DAVIES
C. H. HANFORD,
Attorneys for Plaintiff in Error.



No. 2361

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE CONNELL BROTHERS COMPANY
(a corporation),

Plaintiff in Error,

vs.

DIEDERICHSEN & COMPANY,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

In reply to brief heretofore filed in the above-entitled cause for plaintiff in error, we will argue the points hereinafter set forth, and will refer to the parties hereto as they were designated in the trial court.

I.

THE PLAINTIFF IS NOT PRECLUDED FROM RECOVERY BY A
SUIT IN THE PARTNERSHIP NAME.

(a) In the first place we call the court's attention to the stipulation entered into between plain-

tiff and defendant on the 27th day of May, 1913. (Trans. p. 10.) By virtue of this stipulation the issues involved in the case were narrowed by agreement of the parties and on a decision, based upon the proof offered under said issues, it was stipulated that judgment should be entered.

Under the first subdivision of the stipulation it was agreed "That the hearing and trial of said action be *confined* in the first instance as to the *issue* whether or not the defendant herein has committed a breach of the contract mentioned in the pleadings herein as to shipment or has committed such a breach of the contract as to shipment as will render it liable in damages to the plaintiffs if damages have in fact been sustained by the plaintiffs", etc.

Under the second subdivision it was agreed in effect that if the court should hold adversely to defendant on the first subdivision of the stipulation "then the above entitled matter shall be again set for hearing on the *issue* of damages", etc.

Under the above we submit that the issues in the case are defined and fixed, and that it was agreed that evidence should be required only on the points specified and on the issues thereby raised, and that the stipulation as a whole is an admission of plaintiff's capacity to sue and a waiver of the first paragraph of the answer, inasmuch as the stipulation further provided that upon the evidence introduced under these issues

final judgment was to be made and entered for or against either party.

(b) Defendant in its brief has entitled this cause as "The Connell Brothers Company, a corporation, v. Diederichsen & Company", but the court will notice that in the transcript the defendant in error, plaintiff below, is entitled "H. Diederichsen & Company". On this point we call attention to the case of *A. M. Gilman & Co. v. Cosgrove*, 22 Cal. 356, where a similar point was raised on appeal. The court said (p. 357):

"The objection to this defect has, however, not been taken in a way to be available. If it may be assumed that 'A. M. Gilman & Co.' is the name of a firm of which A. M. Gilman is one of the partners, then the defendant should have demurred to the complaint for a defect of parties. If it be said that it does not appear by any averment in the complaint, and that it cannot be assumed that 'A. M. Gilman & Co.' is the name of a copartnership, then, in order to have made it appear that there was an error in naming the plaintiff, and to have taken effectual advantage of that error, the answer should have denied the purchase of any goods of the plaintiff, and when proof was offered, it should have been shown that the goods were bought of certain individuals, who, perhaps, might have done business under a firm name, but neither of whose names was A. M. Gilman & Co. (citing cases). The objection not having been taken in a proper mode, there was no error committed on this point."

The answer of defendant filed in this case admits that the plaintiffs and the defendant entered into

the contract sued upon, and said answer does not deny that it sold goods to the plaintiffs under said contract; nor when proofs were introduced at the hearing were there any objections on the grounds that the goods were sold to certain individuals as pointed out in the case cited.

(c) We submit that this point is not covered by the ninth and tenth assignments of error, in view of the pleadings, the stipulation of the parties appearing at page 10 of the transcript, and of the evidence submitted in the case. In other words, the said stipulation of the parties eliminated any necessity of proof in the matter, any necessity of objections to evidence, on the ground that *plaintiffs* had not purchased goods from defendant, and there was consequently no reason for the trial court passing upon the matter, and hence it is not subject to any assignment of error, nor is there any basis on which to predicate error by the lower court.

Bort v. McCutcheon, 187 Fed. 798.

II.

NONE OF THE CONTINGENCIES SPECIFIED IN THE CONTRACT AS EXCUSING PERFORMANCE OF ALL OR ANY OF THE AGREEMENTS CONTAINED THEREIN ARE AVAILABLE TO THE DEFENDANT.

(a) The issue here involved was covered by the first subdivision of the stipulation hereinabove

referred to, and was passed on by the court as a preliminary question before any evidence was taken on the subject of damages incurred by a breach of the contract, and was intended to decide whether or not there had been a breach at all in shipping the flour. In addition to the learned and convincing opinion of the lower court on this branch of the case (Trans. p. 250 et seq.), we submit the following:

Counsel for defendant claim in their brief, page 31, that said defendant is not chargeable with negligence by reason of failure to charter a vessel previous to December 30, 1911, at which date plaintiff established a banker's credit. The court will notice that this order for 80,000 sacks of flour was received by the defendant company at Seattle, by cable, about the time it was given by the plaintiff. On page 57 of the transcript the following appears in the testimony of M. J. Connell:

“Q. At what date and in what manner did your firm receive the order here?

“A. By cable early in October.

“Q. October 13th?

“A. About that date.”

On page 100 of the transcript the order for said flour given by Connell Bros. Company to Centennial Mill Company appears, and is dated October 14, 1911. Now although the contract is dated October 17, 1911, and there is therefore

some slight discrepancies in dates, yet it all shows that the order was immediately transmitted.

On pages 20 to 22 of defendant's brief it is sought to establish that there was no contract in this case until acceptance of the bill of lading, unless the notice from the Wells Fargo Nevada National Bank, establishing a banker's credit, constituted an acceptance.

The petition in this case (Trans. p. 2) alleges a written contract between the plaintiff and defendant, dated October 17, 1911. The answer (Trans. p. 6) admits that plaintiffs and defendant entered into a written contract October 17, 1911, and the trial was conducted throughout on the theory that the written contract of October 17, 1911, was a binding contract on both parties as of its date. We submit that it is now too late to attempt to change that theory as argued by the defendant in his brief (p. 20).

There is a well established doctrine in the federal courts to the effect that when a particular ground of action or defense has not been drawn to the attention of the trial court during the course of the proceedings in the trial court, the ground of action or defense cannot be availed of upon an appeal. The reasons for this doctrine are two-fold: (1) The possible unfairness to the other party in taking the point up at such a late date, and (2) The fact that the appellate court is a court for the correction of error solely, and that

the lower court commits no error in taking for granted what the parties themselves took for granted in said court.

- Bort v. McCutcheon & Co.*, 187 Fed. 798;
Brockenbrough v. Champion Fibre Co., 176 Fed. 840;
Mayor etc. of the City of Helena v. United States, 104 Fed. 113;
Hatcher v. N. W. National Ins. Co., 184 Fed. 23;
General Fireproofing Co. v. Wallace & Son, 175 Fed. 650;
Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co., 114 Fed. 133;
Western Union Telgraph Co. v. Winland, 182 Fed. 493;
Oregon Ry. & N. Co. v. Dumas, 181 Fed. 781;
City of Pittsburgh v. Jonathan Clark & Sons Co., 154 Fed. 464.

In the first case cited above, Judge Sanborn (C. C. A. 8th Circuit) said:

“The latter contention was never presented to or ruled upon by the trial court. A writ of error presents for review nothing but the alleged errors of law into which the court below has fallen. As this contention was never presented to or ruled by that court, it did not commit any error concerning it, and there is nothing in relation to it before us for consideration or decision.

“Moreover, the plaintiff tried the case below upon the inconsistent theory that the knowledge of Bort was the real issue in the case,

and that this issue was determinable by the evidence, and he is thereby estopped from reversing the judgment on the ground that this knowledge was not in issue at all."

The court in its decision in this case states in effect (Trans. p. 257) that although the contract was made in October, the proof shows that no steps were taken to provide for the shipment in February until in December, and an ineffective charter was made only on December 29th; that the proximate cause of the position in which defendants found themselves near the end of January, 1912, was therefore due to a lack of the exercise of due diligence. This statement is what prompts defendant to now claim due diligence and to place it on the new ground that no contract was in effect at least until December 30th at the date of the banker's credit.

We submit the above cases will preclude a shifting of the position in an effort to avoid a practical finding of fact by the lower court of negligence on the part of defendant in providing means for carrying out the contract.

(b) The contingent clause contained in the contract and hereinabove referred to is as follows: "All agreements herein contained or implied are contingent upon strikes, accidents and other delays unavoidable or beyond our control." The clause is therefore both specific and general in its terms and the *ejusdem generis* or *noscitur a sociis* rule

is the rule of construction which usually applies under such circumstances. Counsel for defendant correctly state, however, that the rule is one resorted to for the ascertainment of intent. That the rule is applicable to the interpretation of statutes, contracts, etc., by the law as established by the decisions of the courts of the United States, and therefore to be applied by the United States court for China in its decision may be shown by the following citations from the decisions of the federal courts in this country:

Hickman v. Cabot, 183 Fed. 747, C. C. A.
4th Circuit;

*Pennsylvania Steel Co. v. Washington &
Berkeley B. Co.*, 194 Fed. 1011, pp. 1017-8;
U. S. D. Ct. Va.;

Bock v. Perkins, 139 U. S. 628.

The rule is further adverted to and upheld in:

*Hoffman v. Eastern Wisconsin Ry. & Lt.
Co.*, 115 N. W. 383, p. 385 (Wis.);

*American Bridge Co. v. Glenmore Distilleries
Co.*, 107 S. W. 279, p. 283 (Ky.).

Many English authorities on the rule are set forth at length in *Carver "Carriage by Sea"*, 5th Edition, pp. 346 et seq. Therefore, if the general words "other delays unavoidable or beyond our control" are not to be controlled by the words "strikes" and "accidents", then these latter words are entirely superfluous and it was useless to mention them.

We submit that there is nothing in the contract, taken from the broad point of intent of the parties, to take the said contingent clause out of the *ejusdem generis* rule of construction.

Now the contingent clause says, "All *agreements* herein contained or implied are contingent", etc. The agreement in the contract is in effect that a steamer will *sail from either of the said ports named*, during the month of February, 1912, with the 80,000 bags of flour provided that the said *sailing of said steamer from said port* is not delayed by a strike, accident or other delay beyond control. In other words, the strikes, accidents or other delays refer to what is contained or implied from the words of the contract and principally inability through strike or accident or something out of the ordinary and of like character with a strike or accident that may prevent getting the goods from the land and into the steamer. If the interpretation were allowed that the contract was predicated on a charter to be procured (concerning which nothing is said nor in our opinion is it to be implied) then the defense could be made that a vessel being built in San Francisco and guaranteed to be ready to carry cargo in February was delayed by a strike of ship carpenters in California, and the builders were unable to complete the vessel in the time specified; therefore Connell Brothers Company were unavoidably delayed within the purview of the contingency clause of the contract from carrying out its agreement

to ship in February and, therefore, any loss that accrues to Diederichsen & Co. must be borne by them, as defendants are protected by the contract.

We submit that the defendant agreed to *ship* and not to *charter*, and that therefore its claim of diligence in chartering, even if true, is no defense to not shipping by vessel sailing in February.

We further submit that shipment on a regular Pacific liner carrying freight and sailing from any one of the ports named in the month of February for trans-shipment at some Chinese port for Chefoo would be a full compliance with the contract, and would be so claimed by defendant if it had shipped in that way. If this is so, how can a charter be an *implied* agreement contained in the contract. The agreement to have a vessel at one of said ports in February to receive the cargo was absolute and not contingent. But if strike or accident or a like cause prevented the loading of the cargo, then defendant would be protected by the clause.

But assuming for the argument that there was an implied agreement to charter, then our contention is that by the *ejusdem generis* canon the delay of the "Indien" must be caused by a strike, accident or some unavoidable delay of like character; that is, some cause out of the ordinary and in the nature of a catastrophe.

Now the only reason for the delay of the "Indien" from any authentic source is given in the letter of Parrott & Co. to Ostrander (Trans. p. 96), which states that she had been detained for repairs at Buenos Aires. This, it is submitted, is not unusual or in the nature of a catastrophe, but is in the usual course and to be expected, and should have been guarded against when shipping under a contract containing a warranty as to time, and when a charter of a vessel ten thousand miles away is sought for the purpose of carrying out said contract.

This exemplifies the uselessness of a stipulation as to time of shipment if under a contingent clause in the contract warranties referring to time may be so easily done away with by implications not referred to concretely in the contract. If defendant desired to protect themselves against the mischance in chartering, it should have done so specifically.

Defendant, however, after it lost the charter of the "Indien", made arrangements for a charter of the "Harpagus", and in the testimony of L. P. Baumann (Trans. p. 78) said witness, who was export manager for the Centennial Mill Company, stated that Dodwell and Company had the steamer "Harpagus" which was expected on Puget Sound not later than between the 20th and 25th of February; and said witness further down on said page testified that had said steamer arrived at

Tacoma by February 25th she would have been able absolutely to have taken the cargo on board.

On pages 35 and 36 of the transcript it appears that the delay of the "Harpagus", which arrived at Tacoma February 29th (Trans. p. 18 and plaintiff's exhibit "A", p. 41) was due to the refusal of the United States Government, to whom she was consigned with a cargo of coals for Bremmerton, to work on Saturday afternoons, Sundays and holidays, and that this caused a delay of at least two and one-half days. It is contended that this delay by the government is not within the contingency clause: It was not brought about by a strike or an accident nor is it a delay by a cause of like character. It may have been unavoidable and beyond control of defendant but it is not all such delays that are protected but only those of like character with those specified, and it cannot be argued or claimed such was the case with a delay consequent upon the government's refusal to work on holidays.

The cases cited above, in our opinion, cover our contentions on this point, and we therefore submit that defendant was not excused from shipping on a steamer sailing from Tacoma in February, by reason of the contingency clause of the contract.

III.

THE CONTRACT WAS EFFECTIVE AS TO BOTH PARTIES AS OF ITS DATE. THE PLAINTIFF DID NOT LOSE ANY RIGHTS UNDER THE CONTRACT BY THE LETTER OF THE WELLS FARGO NEVADA NATIONAL BANK, NOR BY THE ACCEPTANCE OF THE DOCUMENTS AND PAYMENT THEREFOR BY THE SEATTLE BANK.

The second subdivision of defendant's brief undertakes to show (a) that there was no contract in this case until the banker's credit was established, and (b) that the bank when it accepted the bill of lading and insurance policies waived any stipulation in the memorandum as to the sailing date of the carrying steamer, because the bill of lading itself disclosed that the flour had not been shipped on a steamer sailing within the month of February.

(a) We have heretofore shown that the pleadings, and the theory on which the case was tried, admitted a contract binding on the parties as of the date of the contract, October 17, 1911, and have cited authorities in paragraph II of this brief to show that an appellate court on a writ of error will not entertain a new theory of the case presented for the first time on the appeal. This we submit is decisive of the question as to whether the contract came into existence at the time of the establishment of the banker's credit or at its date.

(b) It is not a necessary implication that the bank acted as agent for the vendee to receive the bill of lading and pay for the flour, nor does the

case of *Merchants Exchange Bank v. McGraw*, cited by defendant, hold to that effect in our opinion; but it holds that the bank taking the documents on payment of the amount was the agent of the bank for which it acted.

In the McGraw case, the Merchants Exchange Bank wired the First National Bank of Seattle as follows: "Draft Kuehn Metzler & Co. on A. F. Luening & Co. for 100 bales hops at 32 cents per pound. Bill of lading and value bill attached will be paid." The bill of lading was taken out in the name of the purchaser, A. F. Luening & Co., but before the draft was cashed in Seattle the goods were attached by creditors of the purchaser, and it was held that the creditors could not prevail and that the Seattle bank was the agent, not of the vendee Luening & Co., but of the Merchants Exchange Bank of Milwaukee in receiving and transmitting the bill of lading. The court said, 59 Fed. page 986:

"In receiving the bill of lading from the drawers of the draft and transmitting the same to the plaintiff, the Seattle bank was acting as the agent of the latter."

The statement that the bill of lading itself disclosed that the flour had not been shipped is not borne out by the facts: The said bill is dated February 28, 1912, a year in which said month had twenty-nine days, and the bank was justified in assuming that the flour had been shipped. It appears from the testimony of M. J. Connell of

Seattle that he thought the flour had been shipped when he received the bills of lading. On redirect examination (Trans. p. 20) the following appears in his testimony:

“Q. Did you or did you not presume that the flour had been shipped when the bills of lading were delivered to you?

“A. I presumed it was.”

This is the testimony of the president of the defendant company, and it is reasonable to draw the inference that if he thought the flour had been shipped when he received the bills of lading that the bank was entitled to the same inference of fact, if they were called upon to make any inference in the matter.

The bills of lading for the flour were delivered to Mr. Connell on February 28th, and on the same day he took the said bills together with insurance policies to the bank in Seattle and received \$83,000 therefor (Trans. p. 60). Exhibits 18 and 19, pages 100 and 101 of the transcript, show that both defendant and Centennial Mill Company, with whom order was placed for the flour, had the same booked for February shipment.

It is further claimed that the notice from the Wells Fargo Bank constituted a modification of the contract as to the sailing date of the steamer. As Judge Thayer has pointed out in his opinion, the words do not necessarily import such meaning.

We submit further that even assuming an agency in the bank for plaintiff, still the wording of the letter does not assume to give instructions as to time of shipment. The words used are: "The shipment is *described* as 80,000 bags flour to Chefoo, shipment February-March, 1912." It would not be permissible for defendant to take such language as modifying the positive contract which they had. If the description of the shipment was somewhat broad, they knew the actual language of the contract, which the bank probably did not. Furthermore, the actual transportation of the goods was supposed to cover parts of February and March and the language could not be misconstrued by the defendant in view of the facts in their possession.

IV.

RIGHTS OF THE PARTIES UNDER THE CONTRACT.

We draw the court's attention to the fact that in the argument of the defendant the second, third and fourth paragraphs all depend upon the proposition that the bill of lading itself disclosed that the flour had been shipped on a steamer sailing within the month of February. This we have heretofore shown to be without foundation of fact; the bills of lading were dated February 28, 1912, and the president of the defendant company himself stated that he presumed the flour had been shipped on the date of the bill.

In the second subdivision of the argument, it is stated that the agent's acceptance of the documents constituted a waiver of any stipulation in the memorandum as to the selling date because the bill of lading disclosed that the flour had not been shipped within the month of February and the bank was the agent of the plaintiff. This argument we have already gone into in the previous subdivision.

The third subdivision of the argument is based upon the same theory; the argument being that the draft being without recourse to the drawer and accompanied by a bill of lading which contained information of the only fact complained of as constituting a breach of warranty, there is a necessary and conclusive presumption that the bank acted within authority previously conferred.

The fourth subdivision of the argument is based upon the same assumed facts. On pages 26-27 counsel for defendant states:

“If there had been a breach of the contract on the part of the defendant in this case, by delay in shipment of the flour and if acceptance of the bill of lading and payment had been without knowledge or means of knowledge on the part of the vendee, the right to rescind the contract and reclaim the purchase money would not have been the only remedy.”

The facts in the case show that the said flour was to be shipped by a steamer sailing from one

of the ports named in the contract in the month of February. The sailing date was a condition precedent to the vesting of any title to the goods in the vendee and a breach of the said condition gave a right to the plaintiff to refuse delivery of the flour.

It was laid down in the leading case of *Norrington v. Wright*, 115 U. S. 188, by Justice Gray:

“In the contracts of merchants, time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract.”

See also *Jones v. United States*, 96 U. S. 24.

In *Mechem on Sales*, Vol. 1, Sec. 746, it is said that if the vendor sends more or less than the quantity ordered or of a different quality, or at a different time, or in a different manner, or otherwise materially varies from the order, the title will not pass unless the purchaser accepts them.

It is held in the case of *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, that a delay in delivery is a substantial breach of the contract, and in such

cases title to the property does not pass to the purchaser.

Williston on Sales, Sec. 278;

Rommel v. Wingate, 103 Mass. 327;

Hoover v. Maher 53 N. W. 646.

The uncontradicted evidence in the transcript is that the goods did not leave the port of Tacoma until March 8, 1912, and therefore there was a breach of the contract *in limine*, and the plaintiffs were at that time in a position to repudiate all liability thereunder. The Seattle Bank, on instructions from the Wells Fargo Nevada National Bank, correspondent of the Russian-Asiatic Bank, had paid a draft for \$83,000 for the said flour upon receipt of insurance policies covering the cargo and bills of lading issued by Dodwell and Company, dated February 28th. The agency of the Seattle Bank, upon presentation of the documents and the draft, was to pay the said draft upon receipt of the documents, and did not require the said bank to ascertain the facts beyond such as they appeared in the documents.

The defendant has argued that the statement in the letter from the Wells Fargo Nevada National Bank to the Seattle Bank (Trans. p. 97) describing the shipment as of February-March, was a justification for the March shipment of the flour. The court will notice that the defendant and the Centennial Mill had interchanged letters concerning this order (Trans. pp. 100-101), and had both had notice that the shipment was a Feb-

ruary shipment. There should, therefore, have been no variation as to the contract by a statement in the letter that the shipment is *described* as 80,000 bags of flour to Chefoo, shipment February-March, 1912.

The said flour was thereafter, and on the 8th day of March shipped from Tacoma and arrived at Chefoo on April 16, 1912. Prior to the arrival of the flour, the plaintiffs had been notified that the flour had not been shipped during the month of February, but had paid for the flour prior to such information (Trans. p. 118). A copy of the protest (Trans. p. 184) made by the plaintiffs in this matter shows that they were informed of the fact that the flour was not shipped in time on April 10th and had paid for the flour on April 9th, and the protest is intended to give notice that they reserved the right to hold the defendant responsible for all claims arising by virtue of a breach of the contract.

It is argued by defendant that by the payment for the flour the contract was closed and all rights waived by reason thereof, on the part of the plaintiff.

The situation in which the plaintiffs found themselves at this time was that they had on their hands 80,000 bags of flour for which they had paid the sum of \$83,000; that the defendants, whom they had previously notified to the effect that they

would refuse the cargo, had answered by communicating with the Shanghai house of the plaintiff and had stated that they had fully performed the contract on their part, and refused to have anything more to do with the matter.

In the testimony of J. J. Connell (pp. 227-228):

“A. I saw Diederichsen & Company here in Shanghai, thinking we might discuss it, and I told them in their office that we considered that we had fulfilled our contract and refused to have anything more to do with it and the interview dropped off there and I left their office.

“Q. You say the conversation dropped off there after you had stated you considered you had fulfilled your contract and refused to have anything more to do with it?

“A. Yes, sir; and that it was their flour; that we had fulfilled our contract; they had authorized us to ship the flour through a credit they had opened up during February and March and we had complied with our agreement.

“Q. You don't think you made a breach of contract?

“A. No, sir; not according to our contract.

“Q. And you washed your hands clean of it?

“A. We declined to have anything more to do with it.”

The buyer as a general rule need not accept goods of a description different from those ordered, for he is not bound to accept what he did not agree to buy, and, as shown above, a difference in

the date of shipment is a variation that will justify a repudiation of the contract.

Pope v. Allis, 115 U. S. 363;

Vigers Bros. v. Sanderson Bros., 1901 K. B. 608.

Since the goods had been thrust upon the plaintiffs in the manner above shown, the plaintiff is not obliged to return them if he notifies the seller that he rejects them.

Grimoldy v. Wells, L. R. 10 C. P. 391.

A resale by the buyer usually renders him liable for the contract price, but if the resale is made unequivocally and with legal authority on account of the seller, payment of its net proceeds will discharge the buyer.

Barnett & Co. v. Terry & Smith, 42 Ga. 283.

In the case of *Strauss v. National Parlor Furniture Co.*, 24 So. 703 (Miss.), the court stated:

“Where goods of specified quantity and quality are sold to a buyer in a distant state, the carrier is not the agent of the buyer to accept or reject the goods, as conforming or not to the contract, but simply as to transportation. The buyer has, under such executory contract, a reasonable time after receipt of the goods from the carrier to examine them, and accept or reject them. Receipt from the carrier is not acceptance of the goods, as complying with the contract in such case. *Pier-son v. Crooks*, 115 N. Y. 548, 22 N. E. 349. And, if the goods do not conform to the terms of specification as to qualities (the existence

of the qualities in such cases being part of the thing sold, and essential to its identity, and a condition precedent to the sale), the buyer can notify the seller that he rejects them, that they are at his (the seller's) risk; and if, within a reasonable time after such notice, the seller does nothing the buyer may sell them to the best advantage in good faith, for the seller's account. It is not necessary that the buyer, in an executory contract, depending for validity upon acceptance after examination, should actually return, or offer to return, the goods especially where the distance is great, and the freight charges large. *Benj. Sales* (6th Ed.), p. 603; *Swann v. West*, 41 *Miss.* 104; *Stevenson v. Burgin*, 49 *Pa. St.* 46; * * * *Dock Co. v. Douglas* (Md.), 34 *Atl.* 1118. 'As a general rule', says Mr. Benjamin (section 689), 'the buyer is entitled to refuse the whole of the goods tendered if they exceed the quantity agreed; and the vendor has no right to insist upon the buyer's acceptance at all, or upon the buyer's selecting out of a large quantity delivered.' And the cases are quite strict upon this point. The reason is, that was not the contract, and a new contract cannot thus be forced upon the buyer. * * * In making the sale referred to by the buyer, he must do so within a reasonable time after promptly rejecting the goods, and notifying the seller of his rejection of them. He can only act as the agent of the seller in making this sale, from the 'necessity of the case' (*Swann v. West*, 41 *Miss.* 104), and should wait a reasonable time to permit the seller to act for himself; and, if the buyer sells, he can reimburse himself only such expenses as were reasonably incurred on account of the seller about the sale, and within the time

which would be reasonable to wait before selling."

In the case of *Rubin et al. v. Sturtevant*, 80 Fed. 930, it is held that:

"When the vendee in an executory contract of sale rescinds the contract and returns the goods, because they do not correspond to a warranty, but the vendor refuses to receive them, it is proper, if not obligatory, for the vendee to take such measures as are expedient to save unnecessary loss to the vendor, and if he sells them, exercising reasonable diligence, he is responsible only for the proceeds."

In *Story on Sales*, Sec. 409, the author states:

"But, where the vendor is a great distance from the vendee, and the goods cannot be returned without great expense, the vendee may, if they do not correspond to the contract, after giving notice to the vendor, and awaiting a reasonable time for his orders, proceed to sell the goods on account of the vendor, and, if they have been paid for, he can recover the difference between the net proceeds of such sale and the original contract price,—or, if they have not been paid for, he will be liable only for such proceeds."

The possession of the flour by the plaintiffs in this case was analagous to the possession of an involuntary bailee with an agency implied by necessity to sell the goods for the defendants, which said agency was to be exercised diligently whenever reasonably necessary to diminish the seller's liability for charges, etc.

It nowhere appears in the record that the plaintiff did not keep the charges on the cargo as low as possible, or that they did not sell for the best price obtainable.

It is laid down in a note in *21 Am. & Eng. Ann. Cas.*, page 602, as follows:

“There seems to be no hard and fast general rule with respect to the measure of damages for delay in the delivery of goods sold, each case being governed to a large extent by its own peculiar facts. The very general rule adopted in all cases is that the injured party shall be reimbursed for the damages actually suffered, which must be computed on a certain and not a contingent basis.”

We submit that the above authorities in addition to those already cited in the able decision of the trial court fully justify the conclusions already reached in this case.

GEORGE H. WHIPPLE,

ALLEN L. CHICKERING,

CHICKERING & GREGORY,

Attorneys for Defendant in Error.

JERNIGAN & FESSENDEN,

Of Counsel.

No. 2361.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

THE CONNELL BROTHERS COMPANY,
a corporation,
Plaintiff in Error,
vs.

H. DIEDERICHSEN & COMPANY,
Defendant in Error.

PETITION FOR REHEARING

To the Honorable Judges of the United States
Circuit Court of Appeals for the Ninth Circuit.

The plaintiff in error in the above entitled cause, being aggrieved by the decision of said cause filed herein on the 18th day of May, 1914, hereby humbly petitions the Court to grant a rehearing of said cause and, as grounds therefor, states:

The decision gives effect to a stipulation in a way to eliminate part of the issues made by the pleadings and restrict the debatable ground to "the two general questions which were reserved by the stipulation and upon which the lower Court passed."

Against this, we shall not complain, but it is manifest that the first of said questions, as restated in the opinion, is very much broader than the question which the stipulation specifies.

THE ISSUES.

Whatever of ambiguity or obscurity of meaning may be due to an excess of verbiage in the first clause of the stipulation, is obviated by the second clause and by the rule that, the meaning of a writing is to be ascertained by fair consideration of its provisions in their entirety. We insist that the first question is not, as the opinion states, "whether or not there was a breach of the contract," but by its terms, the Court was on the preliminary trial to determine the issue: "whether or not the defendant herein has committed * * * such a breach of the contract as to shipment as will render it liable in damages to the plaintiffs if damages have in fact been sustained by the plaintiffs." And we insist further, that the determination of the question, so stated, and the effect to be given to the concluding sentence of the first clause, must be controlled by the second clause which provides: "That in event the Court should hold, find and decide that the defendant had committed such a breach of the said contract as would render it liable if damages had in fact been sustained by the plaintiffs herein by reason thereof, then the above-entitled matter shall be again set for hearing on the issue of damages. * * *"

The words "by reason thereof," are words of limitation governing the hypothetical case, and make the whole document explicit, so that the scope of the inquiry is not, whether or not there had been a mere breach of the contract in a technical sense;

and on the other hand the question is not whether the transaction had culminated in a loss to H. Diederichsen & Company.

The stipulation considered as a new or supplemental agreement does not give rise to a liability dependent upon a finding of a breach of the original contract, as its only basis; nor upon a finding of a financial loss; nor upon a finding of both a breach and a loss. The event essential to a trial upon the issue of damages, is a decision adverse to the plaintiff in error of the issue of liability, involving three elements, viz.: 1. Breach of the contract. 2. Damages suffered. 3. Connection of the first as the proximate and efficient cause of the second element.

What we insist upon is that, destruction of the goods or depreciation in the value thereof caused by a storm, fire, revolution in China, or any happening other than, breach of the contract, could not be a ground of liability by any force or effect to be given to the stipulation.

Before the first question can be decided it is necessary to ascertain and define the terms and requirements of the contract alleged to have been broken. This requires consideration of the whole transaction including the defendant's exhibit No. 16, because that document states the conditions which had to be met and complied with as prerequisite to any right of the vendor to receive or enforce payment of the price of the flour. Notwithstanding admissions in the answer, Exhibit No. 16 (Record, p. 97) is a part of the case because without it there

was no contract and the stipulation being a restatement of the issues it is competent evidence to prove the terms of the contract and the trial Court rightfully overruled the plaintiffs' objections to its admission as evidence. (Record, pages 59 and 114.)

The action is founded upon an executory contract for a sale of merchandise, to be paid for on delivery.

The place for performance of the contract was on the American side of the Pacific Ocean.

The time of performance (as the contract was modified) was in February or March, 1912.

Performance on the part of the vendor comprised shipment of the flour, marine insurance to be secured for the benefit of the vendee and delivery of documents against payment.

These requirements briefly stated in the memorandum signed by the plaintiff in error are amplified and made specific by the letter of the Wells-Fargo-Nevada National Bank of San Francisco. Exhibit No. 16, Record, p. 97.

Authorization to act as its representative in giving the instructions contained in that letter has not been disputed by the defendant in error, and was confirmed by its act in making payment "in settlement of Messrs. Connell Bros. Company's draft" at Cheefoo after it had given notice of the receipt of information that the date of departure from the loading port of the carrying steamer was in March.

THERE WAS NO BREACH OF THE CONTRACT.

This is not a case in which mere lack of evidence to prove a breach is the ground for disputing a fact, but we are justified in making the assertion, because the executory contract was completely performed by both parties and the transaction closed.

The flour was delivered to the carrier, bills of lading were issued and marine insurance effected in February, 1912.

The documents were delivered to and accepted by an agent authorized to receive the same and the contract price was paid by said agent at Seattle, in February, 1912.

The merchandise was carried to destination by a steamer which departed with the same on board in March, 1912, from Tacoma.

There has been no after-discovered malperformance, mistake, error, defect in quality, nor deficiency of quantity of the merchandise so delivered.

There is an absolute and total lack of any scintilla of evidence tending to prove that, the bank which accepted the delivery of the documents and made the payment, was either misinformed or acted under any erroneous supposition as to the time of departure of the carrying steamer; and there is no evidence of misinformation as to the date of the departure of the steamer, being communicated to or relied upon by the vendee, that is to say, by any constituent member of the German firm or company called H. Diederichsen & Company.

The documents delivered, contained true information that the merchandise had been received for transportation by a steamer to be provided in the future, and any assumption that the officers of the bank neglected to read, or misunderstood the import of the bill of lading before accepting delivery thereof is wholly unwarranted.

In negotiating the draft, whereby the vendor was paid the price of the flour, the bank took a risk of its being dishonored by the payee, in case of failure to exact compliance with the conditions essential to protection by the terms of the letter of credit. Therefore, the only reasonable inference, and the legal presumption, is that the documents were examined and understood. There is not a presumption to the contrary from the fact that M. J. Connell presumed, as he testified, that the flour had been shipped when the bills of lading were delivered to him. The date of shipment is not material; it is failure of the carrying steamer to *sail in February*, that constitutes the alleged default. He naturally expected the bank people to say whether or not the documents were satisfactory to them, and would not give heed to a possible ground for rejecting the security offered, not mentioned by them.

Eighty-three thousand dollars is a large sum of money and it is incredible that the bank would have paid the money on the security of a bill of lading dated next to the last day of February for flour *received for shipment*, without the definite in-

structions contained in the letter of the Wells-Fargo-Nevada National Bank.

It is to be observed that Exhibit No. 16, is not a guaranty of payment, it contains an express notice that it is not to be considered as a confirmation of credit by the Wells-Fargo-Nevada National Bank. That bank's relationship to the case is simply that of a mediary to convey notice that credit had been established with the Russo-Asiatic Bank, with specific terms limiting authorization to honor a draft to be drawn on H. Diederichsen and Company; it implies that a shipment of flour was to be the consideration for the draft and the phrase—"Shipment February-March," does not signify that a single shipment was to be in both of those months, the obvious meaning is that the shipment was to be in either.

Full performance of an executory contract as respects place, time, and minor details, is such performance as the parties accept as performance, when not impelled or influenced thereto by duress, fraud, deceit, nor ignorance of material facts.

And when complete performance has been so accepted and the rights of the parties thereafter changed, as in this case, by the transportation of a valuable cargo to a foreign country, thousands of miles distant from the designated place for acceptance of performance, it is then too late to exercise an option to rescind the contract for mere delay in performance.

In this case, acceptance was, necessarily, with

knowledge, because true information was given; more information was obtainable quickly without inconvenience; no fact was misrepresented or concealed; and it was not necessary to transport the flour across the ocean before the vendee could make discovery of the date of the carrying steamer's departure from the loading port.

AGENCY.

True H. Diederichsen and Company were at Chefoo and Shanghai, but the business was not transacted by correspondence through the mail nor by the use of telegraphic wires. An agency was established at Seattle for the consummation of the transaction by acceptance and payment.

In the opinion of this Court, a question is suggested and left undecided as to authorization to modify the contract with respect to the sailing date of the carrying steamer. But there can be no question as to the agency of the bank in Seattle to pay for the flour and accept delivery thereof. The nature of the transaction proves the agency for that purpose, and the necessary inference from what was done in Seattle is confirmed, and the fact of the agency completely established, by what was finally done by the principal party at Chefoo. The document, "Exhibit D," on page 184 of the record tells what H. Diederichsen and Company did. They made a payment—"in settlement of Messrs. Connell Bros. Company's draft amounting to gold—\$83,000.00—(drawn on us against a shipment of

80,000 bags of American flour per S. S. Harpagus)”. They did not pay under protest, nor repudiate the agency of the Seattle bank—the document, called a protest, is a mere declaration made a day after settlement.

The agency is an incontestable fact of the case; the agent is chargeable with knowledge as to the situation of the flour in the possession of the carrier at the time of accepting the documents and making the payment because it had means of knowledge, equivalent to actual knowledge. The law is elementary that the knowledge of an agent, with respect to conditions affecting a transaction within the scope of his agency, is conclusively presumed to be knowledge of his principal, except in cases of fraud and collusion between the agent and the adverse party; and it is certain that this case is not within the exception.

The plaintiff's petition alleges that the delayed shipment was without timely notice to it, and without its knowledge or consent, and that, upon arrival of the carrying ship at Chefoo, it accepted delivery of the flour under protest. This merely ignores, but does not repudiate, the agency of the bank at Seattle; ignores the rule of law making delivery of a bill of lading legal delivery of the goods; erroneously assumes Chefoo to be the place of delivery per the contract; and is utterly false as to acceptance of delivery under protest.

The document put in evidence to prove protest, shows on its face that it was executed a day after

payment in settlement of Connell's draft, and it is dated two days after giving notice that the plaintiff had received information with respect to the sailing date of the carrying ship and six days before her arrival at Chefoo. These allegations do not controvert nor avoid the fact that the contract was completely executed by the vendor and, by the vendee, through its duly authorized agent.

In the light of all the circumstances, acceptance of performance of the contract proves conclusively that it is not a broken contract.

NO DAMAGE BY REASON OF STEAMER TO BEGIN VOYAGE IN FEBRUARY.

The loss sustained by H. Diederichsen & Company was not caused, nor contributed to, by the failure of the carrying steamer to sail in February. That is a fact of the case fully set forth in the appellant's brief on file herein and demonstrated by the uncontradicted evidence.

The real cause of the loss on the transaction was the slump in the market for flour in China, due to the overthrow of the Imperial Government of China and the bankruptcy of bankers and merchants.

The slump occurred in November and December, 1911; and the effects, in the throwing on the market of large stocks of flour at reduced prices, continued throughout 1912. There was no depression of market prices in February or March, nor in April, prior to the delivery of the flour at Chefoo; nor can the loss be traced to any occurrence affected in any

way by the time of its shipment. Therefore there was no damage sustained by H. Diederichsen & Company *by reason of the alleged breach*, or any breach, of the contract sued on.

THERE WAS NO CONTRACT UNTIL THE BANKER'S CREDIT WAS ESTABLISHED.

The opinion censures the appellant for delaying until near the end of December to charter a steamer for the transportation of the flour. But there was a good reason for that delay. H. Diederichsen & Company paid nothing as earnest; and until the middle of December neglected to notify the plaintiff in error that a banker's credit would be established, as provided in the memorandum and the notice that the credit had been actually established, is dated December 27th. Until then there was no contract mutually binding the vendor to sell and the vendee to purchase. The answer does not change that fact, because the so-called "written contract" is exhibited and incorporated into the pleading, and it shows that it was never signed by nor in behalf of the vendee, and by its terms a banker's credit was to be established.

If nothing had been done by either party after the signing of the memorandum on October 17th, no written agreement on the part of the vendee to purchase, no payment made or tendered, no credit established, no ship chartered, and no flour shipped, certainly there would be no contract to be sued on by either party. The appellant acted promptly in

chartering a steamer when notice was given that the banker's credit had been established, and it would have been unbusinesslike to have done so before a sale of the cargo had been definitely assured.

REMEDY FOR BREACH OF WARRANTY.

By its decision this Court affirms that the rule applied by the trial Court in assessing damages was correct. That rule, however, is not the rule applicable to the cause of action pleaded. The petition charges a breach of contract in one particular only, viz., delay beyond the stipulated time for the carrying steamer to sail, and that the plaintiff was damaged by that delay—and alleges as a ground for claiming special damages that the delay had defeated a re-sale contract for part of the flour.

The trial Court did not find and this Court has not found, that the failure to consummate the alleged re-sale contract was a consequence of delay and the evidence proves affirmatively that it was not. Record, p. 146. Therefore, the rule which would be applicable to the case, if liability had been incurred, is the general rule fixing the measure of damages for delay beyond the stipulated time for delivery of merchandise sold, where the buyer has paid the purchase price and received the goods, in the amount of depreciation in value of the goods between the time for delivery specified in the contract and the time of actual delivery.

Clements v. Hawkes Mfg. Co., 107 Mass., 362.
Ramish v. Kirschbraun, 98 Cal., 676; 33 Pac.,
 780.

We think that a substantial error in the decision rendered, is due to failure, to observe that delivery of the bill of lading was delivery of the flour, and that the place of delivery was at Seattle, not Chefoo. The case appears to have been considered by the Court as though, the flour had been sold to be delivered at Chefoo and subject to acceptance there with no obligation on the part of the vendee to assert a right to rescind the contract for delay in performance on the vendor's part at the time and place when and where the title passed by the payment made and delivery of the documents.

Text books and decisions affirming the right of a vendee, on discovery, after acceptance of delivery, of defects of quality, to dispose of the goods and then recover from the vendor the difference between the net proceeds and the price paid, are not authorities in point in this case.

Section 409 of Story on Sales, cited in the opinion of this Court, is of the following tenor:

“But, where the vendor is a great distance from the vendee, and the goods cannot be returned without great expense, the vendee may, if they do not correspond to the contract, after giving notice to the vendee, and awaiting a reasonable time for his orders, proceed to sell the goods on account of the vendor, and, if they

have been paid for, he can recover the difference between the net proceeds of such sale and the original contract price,—or, if they have not been paid for, he will be liable only for such proceeds.”

The rule there stated is clear and explicit in defining the right of a vendee to dispose of goods,—“if they do not correspond to the contract.” By the words of the text, as well as by the context, it is plain that this section treats of breaches of warranty as to the quality of the goods, and the rule given, to be consistent with the following section of the same volume must be restricted to cases where the breach of warranty is not discoverable before transportation of the goods to the place for delivery to the vendee. Section 410 reads as follows:

“But in an executed contract where the goods have been paid for, the vendee has no right to return them upon their failure to correspond to the warranty, but he must sue upon the warranty, and he can then recover, as damages, the difference between the contract price and the actual worth of the goods.”

In this case there has been no complaint made on the ground that the flour received by H. Diederichsen & Company “did not correspond to the contract,” and the authority cited does not fit the case any closer than would Section 423 of the same volume, which states the rules governing cases where the vendor of goods fails to transfer a valid title; in other words, the rule of Section 409 is

specific and not a general rule, applicable to any and every warranty that may be breached. The author's specific rule which does fit a case, *where the vendor retains possession of the goods after the title has passed to the vendee and after a stipulated time for delivery has passed*, is given in Section 450, which reads as follows:

“Again, if, after the property is passed to the vendee, the vendor do not absolutely refuse to deliver the goods, but retain them for an unreasonable length of time, or until the agreed time for delivery has passed, the vendee may, by a special action, recover damages for any injury which may have accrued to him by reason of the delay.”

The plaintiff's petition in this case is based upon the principle of this section; and having failed to prove the special damages alleged to have accrued *by reason of the delay*, the judgment should be for the defendant.

By accepting goods delivered pursuant to an executory contract of sale, the title passes to the vendee and he is thereby precluded from exercising an option to rescind the contract, for any breach of warranty, apparent or discoverable at the time of acceptance; and his remedy, then, for an actual breach of warranty is an action to recover consequential damages. Story on Contracts, 3rd ed., Sections 406, 410, 421, 450.

If the time for the departure of the carrying steamer had not been extended, as we claim, the only

possible loss for which liability was incurred is the amount of the interest on the purchase price from the date of the payment, February 28th, to the date on which the "Harpagus" left Tacoma, March 8th. (*Edwards v. Sanborn*, 6 Mich., 348.) And if a rehearing shall be granted, we will contend that the judgment should be reversed, or modified by reduction to the amount of interest for ten days.

AN ESSENTIAL PREREQUISITE TO RESCISSION OF AN EXECUTED CONTRACT.

A vendee cannot rescind an executed contract of sale, without replacing the vendor in the same position with respect to the goods delivered, that he occupied before delivery. Story on Sales, 3rd ed., Section 427.

This rule was not complied with by an offer to surrender, in China, the flour which had been accepted in America.

The last citation is also authority for the rule that, if the vendee exercises rights of ownership over the goods, he cannot rescind the contract. The defendant in error did exercise rights of ownership inconsistent with the claimed rejection of the goods, by the proceedings in attempting to enforce the resale contract. Record, p. 131.

RESCISSION NOT GERMANE TO THE ISSUES.

Since the decision of the two questions reserved by the stipulation must determine the case, we have a

right to insist and do insist that irrelevant matters shall be excluded from consideration. The question as to the right of H. Diederichsen and Company to rescind the contract, is not within the scope of the issue as to whether or not there was a breach of the contract; nor of the issue of damages. That question is not an issue tendered by the plaintiff's petition, but is an afterthought injected into the case, to repair the breach made by the evidence disproving the allegations to the effect that, the resale contract was defeated by delay, on which the claim for damages is based.

AN ISSUE NOT PASSED UPON.

In conclusion we wish to especially emphasize and press upon the attention of the Court the point, that the kernel in the case, is the issue, reserved by the stipulation, Whether or Not Damage Had Been Sustained by Reason of the Alleged Breach of the Contract.

The connecting link, between cause and effect, that is to say, the sequence of damage from the specified breach of the contract, is the vital part of that issue. By failure to decide that the alleged damage was, or was not, by reason of not shipping the flour by a steamer sailing from the loading port in February, that issue was not passed upon by the trial Court; and it is not determined by the opinion rendered by this Court; and it is wholly ignored by counsel for the defendant in error, in their brief.

The cause of the loss suffered by the defendant

in error is proved affirmatively by the testimony of J. J. Connell and Britt and Emens and the table of market prices in China. Defendant's Exhibit A-1, Record, pages 192-198; 230-244; 246-7; 248.

Large stocks of American flour purchased in October, 1911, began to arrive in China in December; the Chinese revolution ruined bankers and merchants and the market price of flour in China was very much depressed in November and the following months, but from the middle of February until the middle of April, 1912, the market was steady; overstocking of the market and decline in market value, previous to the stipulated time for the carrying steamer to sail; and insolvency of H. Diederichsen & Company's customers caused the loss to them on their purchase. That is the most important fact in this case and it cannot be entirely overlooked in the final determination of the rights of the parties without doing substantial injustice.

We respectfully submit that in the decision rendered there is manifest error, for which a rehearing should be granted.

KERR & McCORD,
C. H. HANFORD,
FLEMING & DAVIS,
Attorneys for Plaintiff in Error.

CERTIFICATE.

I, Cornelius H. Hanford, an attorney at law admitted to practice in the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify that I am of counsel for the plaintiff in error in the above entitled cause; that in my judgment the foregoing petition for a rehearing of said cause is well founded and that it is not interposed for delay.

Cornelius H. Hanford
Of Counsel for Plaintiff in Error.

United States
Circuit Court of Appeals

For the Ninth Circuit.

POTLATCH LUMBER COMPANY, a Corpora-
tion,

Plaintiff in Error,

vs.

SUSAN HARKINS,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the District of Idaho, Northern Division.

FILED

MAY 27 1914

United States
Circuit Court of Appeals

For the Ninth Circuit.

POTLATCH LUMBER COMPANY, a Corpora-
tion,

Plaintiff in Error,

vs.

SUSAN HARKINS,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the District of Idaho, Northern Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Admission of Service of Bill of Exceptions, etc..	184
Answer.....	10
Assignments of Error.....	188
Attorneys, Name and Addresses of.....	1
Bill of Exceptions.....	29
Bond on Writ of Error.....	195
Certificate of Clerk U. S. District Court to Record.....	203
Citation on Writ of Error (Original).....	201
Complaint.....	1
Exceptions to Instructions.....	182
EXHIBITS:	
Plaintiff's Exhibit 1—Photograph.....	205
Instructions to Jury.....	174
Judgment.....	20
Motion of Defendant for Instructed Verdict....	171
Names and Addresses of Attorneys.....	1
Order Allowing Bill of Exceptions.....	185
Order Allowing Writ of Error and Fixing Amount of Bond.....	187

Index.	Page
Order Denying Motion of Defendant for Instructed Verdict.....	172
Order Denying Petition for New Trial.....	28
Order Directing Transmission of Original Exhibits.....	197
Order Extending Time to File Bill of Exceptions	22
Order Granting Petition for Writ of Error.....	186
Petition for New Trial.....	22
Petition for Writ of Error.....	185
Praecept for Transcript.....	198
TESTIMONY ON BEHALF OF PLAINTIFF:	
BAILEY, WILLIAM.....	30
Cross-examination.....	38
Redirect Examination.....	48
Recross-examination.....	49
CHERRY, JOE.....	99
Cross-examination.....	100
HARKINS, MRS. SUSAN.....	118
Cross-examination.....	122
MANNING, THOMPSON R.....	85
Cross-examination.....	87
PAYZANT, RAY.....	105
Cross-examination.....	107
Redirect Examination.....	110
Recross-examination.....	111
Redirect Examination.....	117
YOUNG, CHARLES.....	94
Cross-examination.....	95
Redirect Examination.....	97
Recross-examination.....	98

Index.

Page

TESTIMONY ON BEHALF OF PLAIN-

TIFF—Continued:

YOUNKIN, HARRY.....	50
Cross-examination.....	66
Redirect Examination.....	81
Recross-examination.....	84
Recalled.....	117
WESTFALL, GEORGE.....	88
Cross-examination.....	90

TESTIMONY ON BEHALF OF DEFEND-
ANT:

HART, R. M.....	132
JONES, THOMAS P.....	142
Cross-examination	149
MURPHY, NORRIS P.....	157
Cross-examination.....	161
Redirect Examination.....	162
Recross-examination.....	163
Redirect Examination	163
ROGERS, E. M.....	125
Cross-examination.....	130
TOMS, A. C.....	153
Cross-examination.....	156
WARD, MICHAEL J.....	163
Cross-examination	167
Redirect Examination.....	168
Recross-examination.....	168

Verdict.....	19
Writ of Error (Original).....	200

[Names and Addresses of Attorneys.]

Messrs. CANNON, FERRIS & SWAN, Spokane,
Washington,

Messrs. BLACK & WERNETTE, Coeur d'Alene,
Idaho,

Attorneys for Plaintiff in Error.

Messrs. ELDER & ELDER, Coeur d'Alene, Idaho,
Attorneys for Defendant in Error.

*In the District Court of the Eighth Judicial District
of the State of Idaho, in and for the County of
Kootenai.*

SUSAN HARKINS,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY,

Defendant.

Complaint.

The above-named plaintiff complains of the above-named defendant, and for cause of action alleges:

I.

That the plaintiff is now and at all the times herein mentioned was a citizen and resident of the State of Idaho.

II.

That at all the times herein mentioned the defendant was and yet is a corporation duly organized and existing under and by virtue of the laws of the State of Maine, and engaged in business in the State of

Idaho, and that said defendant is a foreign corporation engaged in business in the county of Kootenai, State of Idaho.

III.

That on or about the 9th day of November, A. D. 1911, said defendant was loading logs on cars at Bovill, Idaho, and at said time the said defendant was engaged in lumbering and lumber operations.

IV.

That on or about the 9th day of November, 1911, Harry Harkins was in the employ of the defendant as top loader, working on cars loading logs at Bovill, Idaho. That the duties of the [1*] said Harry Harkins in the ordinary discharge thereof were to assist in loading the logs and placing the same after they had been lifted and raised onto the cars.

V.

That the plaintiff is the wife and sole surviving heir at law of Harry Harkins, a man of the age of forty (40) years, and up to the time of sustaining the injuries hereinafter mentioned resided with his wife, the above-named plaintiff at Spirit Lake, Kootenai County, Idaho. That at the time during his life up to the time he sustained the injuries, hereinafter set out, the said Harry Harkins had been a strong, bright and healthy man, and in all ways and respects a companion and comfort to the plaintiff, and for a long time prior to sustaining said injuries had been earning and was capable of earning from one hundred (\$100.00) to one hundred and fifty (\$150.00) dollars per month. That said Harry Hark-

*Page number appearing at foot of page of original certified Record.

ins was capable of earning large sums of money which he contributed to this plaintiff for her support and maintenance. That the said Harry Harkins was earning the sum of three and 50/100 (\$3.50) dollars per day from said defendant as top loader at the time he received the injuries hereinafter set out.

VI.

That it was the duty of Harry Harkins to assist in loading logs and to assist in placing the logs on cars and in addition thereto it was the duty of the said Harry Harkins to perform any work necessary in and about the place where they were loading logs, when called upon by the foreman in charge of said work, and it was the duty of said Harry Harkins to do such work as was necessary or directed by said foreman or other employees in charge of said work.

[2]

VII.

That Harry Younkin was foreman and in charge of the work for defendant where Harry Harkins was working, in general charge of the loading of logs at the place where Harry Harkins was working. That said Harry Younkin also was foreman and had charge of the skidding of logs in placing said logs near the track so the same could be loaded on cars, and that the said Harry Younkin had general superintendence and control of the work upon which Harry Harkins was working and of the said Harry Harkins. That in addition to the said Harry Younkin one W. M. Bailey, engineer, had charge of the work where Harry Harkins was working and it was the duty of the said Harry Harkins to follow the directions and

to take orders from the said W. M. Bailey, and that in the absence of the foreman the said W. M. Bailey had complete control and supervision of the work on which Harry Harkins was engaged and of said Harry Harkins.

VIII.

That it was the duty of Harry Harkins to do said work as was directed by said Harry Younkin, and W. M. Bailey, or either of them, and to assist in said work as he was directed to perform by them or by either of them, and the said Harry Harkins was under the supervision, control and direction of the said representatives of the defendant, and each of them. That on or about the 9th day of November, A. D. 1911, the said Harry Younkin ordered and directed Harry Harkins, the husband of this plaintiff, to assist in skidding logs at a point on the Washington Idaho & Montana R. R. about seven miles from Bovill, in Latah County, Idaho. That the said defendant was skidding logs at said place with a crew of men under the charge, direction, superintending and control of Harry Younkin. That the said Harry Younkin instructed [3] and directed the said Harry Harkins to leave his work as top loader and to assist in the skidding of logs at said place.

IX.

That on the 9th day of November, A. D. 1911, the said defendant was skidding logs at the place where the injury to the said Harry Harkins occurred with a Marion steam loader. That the Marion steam loader is not suitable or adapted to be used as a skidding machine. That the said Marion steam

loader is not equipped with the whistle-cord, or any devise whatever for the purpose of giving signals. That the Marion steam loader, while being used by the said defendant as a skidding machine, was not provided with a haul back or was not provided with a whistle-cord or signal line of any kind. That on or about the 9th day of November, A. D. 1911, while the said Harry Harkins was engaged in the orderly, regular and careful discharge of his duties and service to the defendant he was ordered by said defendant and by its *fore-* and employees in charge of said work to assist in the skidding of logs, with a Marion steam loading machine. That said Harry Harkins was ordered to assist in pulling the cable up the hill, and to assist in giving signals to the engineer, that the said Harry Harkins did assist other employees of said defendant to pull the cable up the hill, and after the same had been fastened to a log Harry Harkins walked away from the cable about fifty (50) or sixty (60) feet to a place of apparent safety.

That thereafter, without any fault or negligence on the part of Harry Harkins, the said defendant, its employees, and officers in charge of said work, while attempting to pull a log up to and near the railroad track, with said Marion steam loader, for the purpose of skidding and placing said logs near the railroad track, in order that said logs so skidded might be easily loaded on the cars, started the said Marion steam loader to [4] pulling and hauling the logs toward the railroad track and that the said defendant, its employees, managers, and agents in charge of said work, carelessly, negligently, wrongfully and

without regard to the safety of the employees and without regard to the safety of said Harry Harkins, pulled and hauled the said logs on to and against a tree, and negligently and carelessly and without regard to the safety of said Harry Harkins stopped said Marion loading machine and allowed the said log to run and be dragged on to and against a tree, knocking said tree over on to the said Harry Harkins, and the said Harry Harkins was thereby mortally wounded, of which injuries the said Harry Harkins died on the 9th day of November, A. D. 1911, at *at* said county of Latah, State of Idaho.

That the death of Harry Harkins was wholly caused by and through the negligence and carelessness of said defendant, its managers, agents and employees, in operating and running the said Marion steam loader as a skidding machine, such machine not being adapted or suitable to be used for the purpose of skidding logs, and by and through the carelessness and negligence of said defendant, its agents, servants and employees in charge of said work, in the careless and negligent operation of said Marion steam loader; and said injuries were received by Harry Harkins without any fault or negligence on the part of said Harry Harkins.

X.

That the said injury to Harry Harkins *were* wholly caused through the carelessness and negligence of the said defendant in operating a Marion steam loader as a skidding machine; that the said Marion steam loader is not suitable and not adapted to the purpose of skidding logs, and that by reason of said

defendant's carelessness in using said Marion steam loading machine and by reason of the facts that said Marion steam loading machine has not [5] the necessary appliances for the safety of employees in skidding logs, the said Harry Harkins received the injuries herein above set out.

That the said Marion steam loading machine was unsafe and dangerous appliance with which to perform the work on which Harry Harkins was engaged, for the reason that it was not supplied or equipped with proper appliances and with the appliances commonly used on skidding machines. That the appliances furnished by said defendant for performing the said work, and so furnished to the said Harry Harkins, and to the other employees of the said defendant for the purpose of performing the said work were dangerous, and plaintiff further alleges that the said defendant, and its said employees in charge of said work, had and prior to the time of the injury to said Harry Harkins, as herein alleged, had full notice and knowledge that the said Marion steam loading machine was an unsafe machine for performing said work of skidding logs, and that the said loading machine was not a reasonably safe appliance or implement for the performance thereof, and defendant had full notice and knowledge that there was danger in the use of the Marion steam loading machine in skidding logs, that it had no means of giving signals and that employees were liable to be injured at any time by the use of the Marion steam loading machine for the purpose of skidding logs, and that full notice and

knowledge that there was danger with the use of said machine, and that employees were liable to receive injuries in the same manner as Harry Harkins was injured. That plaintiff alleges that Harry Harkins was inexperienced in said work, and that he did not know and did not appreciate that there was danger by the performance of the work in the manner adopted by the said defendant, and its servants in charge thereof.

The plaintiff further alleges that it was the duty of the defendant to adopt a reasonably safe plan or method in the performing [6] of said work, and it was the duty of said defendant to use reasonable precaution consistent with the nature of work, to prevent injury to said Harry Harkins and other employees of said defendant.

That the said work could have been rendered safe had said defendant used a regular skidding machine for the purpose of skidding said logs. That said defendant, its foreman, agents and employees in charge of said work, in exercising reasonable care and reasonable precaution, should have been able to know and did know that the said method used by said defendant in skidding the logs was an improper and unsafe method, and that said Marion steam loading machine was not a safe appliance or machine to be used for the purpose of skidding logs, and was an unsafe method of performing said work.

XI.

That on the 13th day of March, A. D. 1912, notices of the time, place and cause of said injuries were given to said defendant, and said notice was in

writing and signed by said plaintiff.

XII.

That by reason of the death of said Harry Harkins, caused by and through the carelessness and negligent act of the defendant, the Potlatch Lumber Company, as aforesaid, and by reason of the facts herein alleged, plaintiff becomes and is deprived of the services physical and mental labors and energies, comfort, happiness, society, and companionship of said Harry Harkins and is thereby damaged in the sum of twenty-five thousand dollars (\$25,000).

WHEREFORE, plaintiff demands judgment against said defendant, the Potlatch Lumber Company, a corporation, for said sum of twenty-five thousand (\$25,000.00) dollars, together with her [7] costs in this behalf laid out and expended.

ELDER & ELDER,

Attorneys for Plaintiff,

Residence and P. O. Address: Coeur d'Alene, Idaho.

State of Idaho,

County of Kootenai,—ss.

Susan Harkins, being first duly sworn, deposes and says that she is the above-named plaintiff, that she had read the foregoing complaint, and knows the contents thereof, and believes the same to be true.

MRS. SUSAN HARKINS.

Subscribed and sworn to before me this 24th day of April, A. D. 1912.

E. F. CONKLIN,

Justice of the Peace, Kootenai County, State of Idaho, Spirit Lake Precinct.

[Endorsed]: Filed June 8th, 1912.

[Endorsed]: Filed in my office July 25th, 1912, at 9:30 A. M. A. L. Richardson, Clerk. By Lawrence M. Larson, Deputy Clerk. [8]

*In the District Court of the United States, for the
District of Idaho.*

SUSAN HARKINS,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corpora-
tion,

Defendant.

Answer.

Comes now the defendant, Potlatch Lumber Company, and for answer to the complaint of the plaintiff herein alleges:

I.

Admits paragraphs I, II and II, of plaintiff's complaint to be true.

II.

Answering paragraph IV, defendant denies that on or about the 9th day of November, 1911, Harry Harkins was employed as top loader, and denies that he was working on cars loading logs at Bovill, Idaho. Denies that the duties of the said Harry Harkins in the ordinary discharge thereof were to assist in loading the logs and place the same after they had been lifted and raised into cars.

III.

Answering paragraph V of said complaint, defendant admits that at the time he was employed by this

defendant, Harry Harkins was earning the sum of \$3.50 per day, but alleges that it has no knowledge or information sufficient to form a belief as to the other matters and things alleged in said paragraph V, and therefore denies the same. [9]

IV.

Answering paragraph VI of said complaint, defendant admits that it was the duty of Harry Harkins to perform such duties as he was directed to do by the foreman under whom he was employed.

V.

Answering paragraph VII of said complaint, the defendant admits that Harry Younkin was defendant's foreman and in charge of the work in which said Harkins was employed. Defendant denies that W. M. Bailey had charge of the work where Harry Harkins was working, or any work whatsoever, and denies that it was the duty of said Harry Harkins to follow the directions or to take orders from said W. M. Bailey or from any one other than the said foreman Harry Younkin, and denies that in the absence of the said foreman the said W. M. Bailey had complete control and supervision or any control or supervision whatever of the work in which said Harry Harkins was engaged or of said Harry Harkins.

VI.

Answering paragraph VIII of said complaint, defendant admits that it was the duty of Harry Harkins to do such work as he was directed to do by the foreman Harry Younkin, but denies that W. M. Bailey had any authority or control over the said Harry Harkins or that he was required to assist in

any work under the direction or control of said W. M. Bailey, or anyone other than the said Harry Younkin. Admits that on or about the 9th day of November, 1911, said Harry Harkins was assisting in skidding logs as alleged in said paragraph VIII, but denies that he was instructed and directed to leave his work as top loader or any other work by the said Harry Younkin or by anyone else, and denies that he was directed and instructed to assist in [10] skidding logs at said place or at any place or at all.

VII.

Answering paragraph IX of said complaint, defendant admits that on the 9th day of November, 1911, it was engaged in skidding logs with a Marion steam loader at the place where the injury to said Harry Harkins occurred. Defendant denies that a Marion steam loader is not suitable or adapted to be used as a skidding machine, and denies that said Marion steam loader is not equipped with a whistle-guard or any device whatever for the purpose of giving signals. Denies that the Marion steam loader, while being used by the said defendant as a skidding machine, was not provided with a haul-back, and denies that it was not provided with a whistle-guard or signal of any kind. Denies that on or about the 9th day of November, 1911, while said Harry Harkins was engaged in the orderly, regular and careful discharge of his duties and service to the defendant, that he was ordered by said defendant and by its foreman and employees, or by anyone in charge of said work, to assist in the skidding of logs with a Marion steam loader, or any other loading

machine or at all. Denies that said Harry Harkins was ordered to assist in pulling the cable up the hill and to assist in giving signals to the engineer or to anyone else. Denies that said Harry Harkins did assist other employees of the said defendant to pull the cable up the hill, and denies that after the same had been fastened to a log Harry Harkins walked away from the cable about fifty or sixty feet, or any distance whatever, to a place of apparent safety, or to any other place or at all. Denies that thereafter, without any fault or negligence on the part of Harry Harkins, the said defendant, its employees and officers in charge of said work, [11] or anyone else, while attempting to pull a log up to and near the railroad track with said Marion steam loader or any loader whatever for the purpose of skidding and placing said log near the railroad track or at any other point in order that said log so skidded might be easily loaded on the cars, started the said Marion steam loader to pulling and hauling the log toward the railroad track or to any other point or at all, and denies that the said defendant or any of its employees, managers or agents in charge of said work, or any work, carelessly, negligently, wrongfully or without regard to the safety of the employees or to the safety of said Harry Harkins, pulled and hauled the said logs on to and against a tree, and denies that it negligently or carelessly or without regard to the safety of said Harry Harkins, or in any other manner, stopped said Marion loading machine or allowed the said log to be run or dragged on to and against a tree, knocking said tree over and on to the said Harry Harkins. Defendant admits that said Harry

Harkins died on or about the 9th day of November, 1911, from the injuries sustained by him while in the employ of this defendant, but denies that the death of said Harry Harkins was wholly caused or in any manner whatever caused by or through the negligence and carelessness of said defendant or its managers, agents or employees, in operating and running the said Marion steam loader as a skidding machine, or in any other manner or at all. Denies that said machine was not adapted or suitable to be used for the purpose of skidding logs, and denies that by or through the carelessness or negligence of said defendant or its agents, servants or employees in charge of said work, or any of them, or in the careless or negligent operation of said Marion steam loader, said injuries were received by said Harry Harkins, and denies that the said Harry Harkins was without fault or negligence on his part. [12]

VIII.

Answering paragraph X of said complaint, defendant denies that the said injury to Harry Harkins was wholly or in any manner whatever caused through the carelessness or negligence of said defendant in operating a Marion steam loader as a skidding machine or for any other purpose. Denies that said Marion steam loader is not suitable and adapted to the purpose of skidding logs, and denies that by reason of said defendant's carelessness in using said Marion steam loading machine or by reason of the fact that said Marion steam loading machine has not the necessary appliances for the safety of employees in skidding logs, the said Harry Harkins was injured or that such injuries were due to any neg-

ligence or carelessness of defendant whatever. Denies that the said Marion steam loader was an unsafe or dangerous appliance with which to perform the work in which Harry Harkins was engaged or that it was unsafe or dangerous in any manner whatsoever, or at all. Denies that it was not supplied or equipped with proper appliances and with the appliances commonly used on skidding machines. Denies that the appliances furnished by said defendant for performing the said work or furnished the said Harry Harkins or to the other employees of the said defendant for the purpose of performing the said work were dangerous, and denies that its said employees in charge of said work prior to the time of the injury to said Harry Harkins or at any other time or at all had full notice and knowledge or any notice or knowledge that the said Marion steam loading machine was an unsafe machine for performing said work of skidding logs or for any other purpose whatever or at all, and denies that said loading machine was not a reasonably safe appliance or implement for the performance thereof or for any other purpose or at all. [13] Denies that defendant had full notice and knowledge or any notice or knowledge whatever that there was danger in the use of the Marion steam loading machine in skidding logs or for any other purpose or at all. Denies that it had no means of giving signals or that the employees were liable to be injured at any time by the use of the Marion steam loading machine for the purpose of skidding logs or for any other purpose or at all, and denies that it had full knowledge and notice or any knowledge or notice whatever that there was danger

with the use of said machine or that the employees were liable to receive injuries in the same manner in which Harry Harkins was injured or in any other manner whatever or at all. Denies that Harry Harkins was inexperienced in said work, and denies that he did not know and did not appreciate that there was danger about the performance of the work in the manner adopted by this defendant and its servants in charge thereof. Denies that it was the duty of this defendant to adopt a reasonably safe plan or method of performing said work or any method or plan whatever, and denies that it was the duty of this defendant to use reasonable precaution or any precaution whatever consistent with the nature of the work to prevent injury to said Harry Harkins and other employees of said defendant or at all. Denies that said work could have been rendered safe had said defendant used a regular skidding machine or any other or different machine for the purpose of skidding said logs or for any other purpose or at all. Denies that said defendant or its foreman or agents or employees in charge of said work or any other work in exercising reasonable care or precaution, or any care or precaution whatever, should have been able to know or did know that the method used by said defendant in skidding the logs was an improper or unsafe method, and denies that [14] said Marion steam loading machine was not a safe appliance or machine to be used for the purpose of skidding logs, or denies that it was an unsafe method of performing said work or was in any manner unsafe whatever or at all.

IX.

Denies that on the 13th day of March, 1912, or at

any other time, notice of the time, place and cause of said injury or any notice whatever was given to said defendant. Denies that said notice or any notice was in writing or signed by the plaintiff.

X.

Denies that the death of said Harry Harkins was caused by or through the careless or negligent act of the defendant or any act whatever of the defendant Potlatch Lumber Company, and denies that plaintiff is damaged in the sum of \$25,000.00 or any sum whatever through the carelessness or negligence of this defendant.

FOR A FIRST AFFIRMATIVE ANSWER AND DEFENSE to plaintiff's alleged cause of action, defendant shows to the Court:

1. That it is a corporation as alleged in said complaint and has paid its license fee last due the State of Idaho.

2. That the injury resulting in the death of the said Harry Harkins was caused solely and alone by reason of the failure of said Harkins to keep out of the way of the logs which were being hauled and of falling trees, and said injury was not in any manner caused by this defendant or any of its agents or servants, for whose negligence, if any, defendant is or was responsible. [15]

FOR A SECOND AFFIRMATIVE ANSWER AND DEFENSE to plaintiff's alleged cause of action defendant shows to the Court:

1. That the said Harry Harkins, in undertaking and performing the work in which he was then and there engaged, assumed and took upon himself all dangers and risks incident to the business in which

he was employed, including the dangers and risks of being struck by falling trees and branches thereof, and that he had full knowledge and notice of all said risks and dangers.

FOR A THIRD AFFIRMATIVE ANSWER AND DEFENSE to plaintiff's alleged cause of action defendant shows to the Court:

1. That if the injury resulting in the death of the said Harry Harkins was in any manner caused or contributed to by the carelessness or negligence of anyone except himself, the same was caused and contributed to by the fellow-servants of said Harry Harkins who were then and there working with him and for whose negligence defendant is and was not in any way responsible.

WHEREFORE, defendant prays that plaintiff take nothing by this action, and that defendant have judgment for its costs and disbursements herein.

CANNON, FERRIS & SWAN, and
R. L. BLACK,

Attorneys for Defendant.

Residence and Postoffice Address of R. L. Black,
Coeur d'Alene, Idaho. [16]

State of Idaho,

County of Kootenai,—ss.

R. L. Black, being first duly sworn, upon oath deposes and says: That he is one of the attorneys for the Potlatch Lumber Company, defendant named in the above-entitled action, and makes this verification for and on behalf of said corporation; that he has read the foregoing answer, knows the contents thereof, and the same is true as he verily believes.

R. L. BLACK.

Subscribed and sworn to before me this 31st day of August, 1912.

N. D. WERNETTE,
Notary Public in and for the State of Idaho, Residing at Coeur d'Alene, Idaho.

Service of foregoing Answer admitted, and a true copy thereof received this 31st day of August, 1912.

ELDER & ELDER,
Attys. for Plaintiff.

[Endorsed]: Filed August 31, 1912. A. L. Richardson, Clerk. By Lawrence M. Larson, Deputy Clerk. [17]

*United States District Court, Northern Division,
District of Idaho.*

SUSAN HARKINS,

Plaintiff,

vs.

THE POTLATCH LUMBER COMPANY,

Defendant.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff and assess the damages at the sum of Five Thousand and no/100 Dollars (\$5,000.00).

J. W. ANDERSON,
Foreman.

[Endorsed]: Filed Nov. 22, 1913. A. L. Richardson, Clerk. [18]

*United States District Court, Northern Division,
District of Idaho.*

SUSAN HARKINS,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corpora-
tion,

Defendant.

Judgment.

This cause came on regularly to be heard in open court on the 20th day of November, A. D. 1913, before the Honorable Frank S. Dietrich, Judge presiding, sitting with a jury; and Elder & Elder appearing as counsel for the plaintiff; and Black & Wernette, and Cannon, Ferris & Swan appearing as counsel for the defendant. A jury was duly empanelled and sworn to try the cause; whereupon witnesses were sworn and examined, and evidence introduced on behalf of both the plaintiff and the defendant; and after argument of the respective counsel, the Court instructed the jury; whereupon after hearing the evidence and argument of counsel and the instructions of the Court, the jury, on the 22d day of November, A. D. 1913, retired in charge of officers of the Court, duly sworn for that purpose, to consider their verdict; and subsequently, on the same date, returned into the court with the following verdict:

(Title of Court and Cause.)

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff, and assess the damages at the sum of Five Thousand and no/100 Dollars (\$5,000.00).

J. W. ANDERSON,

Foreman. [19]

NOW, THEREFORE, by reason of the law and the premises, and of said verdict,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED: That said plaintiff, Susan Harkins, do have and recover of and from the Potlatch Lumber Company, the sum of Five Thousand and no/100 Dollars (\$5,000.00), with interest thereon at the rate of seven per cent per annum from this date; together with plaintiff's costs and disbursements, necessarily incurred in this action, taxed in the sum of \$379.55.

Done in open court this 22d day of November, A. D. 1913.

[Endorsed]: Filed Nov. 22, 1913. A. L. Richardson, Clerk. [20]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

SUSAN HARKINS,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY,

Defendant.

Order Extending Time to File Bill of Exceptions.

Upon motion of defendant, and good cause being shown therefor,

IT IS HEREBY ORDERED, that said defendant be and it is hereby granted sixty days after date within which to prepare, serve and file its proposed bill of exceptions in the above-entitled cause.

IT IS HEREBY FURTHER ORDERED, that stay of execution be and the same is hereby granted to said defendant upon the verdict and judgment rendered herein upon the 22d day of November, 1913, for said period of sixty days.

Done in open court this 28th day of November, 1913.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed Nov. 28, 1913. A. L. Richardson, Clerk. [21]

*In the District Court of the United States for the
District of Idaho, Northern Division.*

SUSAN HARKINS,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Petition for New Trial.

Comes now the defendant in the above-entitled cause and moves the Court to set aside the verdict of the jury rendered against it at a former date in the present term of said court, to wit, on the 22d day of

November, 1913, and the judgment of the court based thereon, and to grant defendant a new trial in said cause for the following reasons, and upon the following grounds, to wit:

I.

Irregularity in the proceedings of the court, jury and adverse party, by which defendant was prevented from having a fair trial.

II.

Misconduct of the jury.

III.

Accident and surprise which ordinary prudence could not have guarded against.

IV.

Newly discovered evidence material for the defendant which it could not with reasonable diligence have discovered and produced at the trial. [22]

V.

Excessive damages appearing to have been given under the influence of passion and prejudice.

VI.

Insufficiency of the evidence to justify the verdict, and that the verdict is against the law.

The defendant alleges the evidence to be insufficient to support the verdict in the following particulars, to wit:

1. That there is no substantial evidence to authorize or justify said verdict or judgment thereon in favor of the plaintiff and against this defendant, in that said evidence fails to show that defendant was guilty of any negligence whatsoever which in any way was the approximate cause of the accident.

2. That the evidence shows conclusively that the accident resulting in the death of the deceased was caused by a log rolling against a tree and breaking it off, and striking the deceased while the work was being performed by defendant in the usual and customary manner, and that the risks and dangers incident thereto were assumed by the deceased.

3. That the testimony shows conclusively that the deceased had full knowledge of the manner in which the work, at the time of his death, was being performed by the defendant, and its servants and employees, and that he had assisted in performing the work in the same manner for more than two weeks prior to the date of his death.

4. That the evidence shows conclusively that the Marion steam loader, with which the work of skidding the logs was being performed at the time of the accident to the deceased, was a suitable and safe machine and appliance for doing such work, and it was usually and customarily used by the defendant [23] and other companies in like business for the purpose of skidding and loading logs within a radius of five hundred feet.

5. That the evidence fails to show that the Marion steam loader with which the deceased and his fellow-servants were working at the time of his death was in any way defective, or out of repair, or unsafe, or unsuitable in any manner whatsoever for the work in which it was being used, but, on the contrary, the evidence conclusively shows that the said Marion steam loader was in no way defective, and that it was a safe and suitable machine for the purpose for

which it was being used at said time and place.

6. That the evidence shows conclusively that the Marion steam loader was in general use all over the country by lumber companies for the purpose of both loading and skidding logs, and that it was not customary or usual to equip said machine with a signal wire or haul-back line, or to use a signal wire or haul-back line upon any machine when the same is used for the purpose of skidding logs within a radius of five hundred feet.

7. That the evidence wholly fails to show that the use of the Marion steam loader at the time and in the manner in which it was being used when the deceased met his death was in any way the proximate cause of the accident resulting in such death, but, on the contrary, the evidence conclusively shows that the accident could not and would not have been prevented by the use of a machine equipped with a signal wire or haul-back line.

8. That the evidence fails to show that the defendant was guilty of any negligence in using a Marion steam loader for the purpose of skidding logs within a radius of five hundred feet, without having same equipped with a signal wire or haul-back line, but, on the contrary, the evidence shows [24] conclusively that it is customary and usual to skid logs for a distance of five hundred feet or less, without using either a signal wire or haul-back line upon the machine.

9. That the evidence fails to show that the use of said Marion steam loader for the purpose and in the manner it was being used at the time of the ac-

cident to the deceased was more dangerous than other machines customarily used for skidding logs within a radius of five hundred feet, or that defendant did not act in a reasonable and prudent manner by so using said Marion steam loader.

VII.

Errors in law occurring at the trial:

1. On account of the insufficiency of the evidence to show any liability on the part of the defendant for the death of the deceased, as hereinbefore fully set out under the sixth ground of this motion.

2. The Court erred in denying defendant's motion for nonsuit and a dismissal of this action at the close of plaintiff's case, for the reason that the plaintiff has failed to show that the defendant was guilty of any negligence whatever in the premises.

3. The Court erred in denying defendant's motion for a directed verdict at the close of all the testimony in said cause, for the same reasons as stated under the sixth ground of this motion.

4. The Court erred in refusing to grant defendant's request to direct the jury to return a verdict for the defendant, for the same reasons as hereinbefore set out in this motion.

5. The Court erred in refusing to permit defendant to question plaintiff's witness, Harry Younkins, upon cross-examination, as to the usual and customary manner of performing [25] the work of skidding logs within a radius of four or five hundred feet, and in sustaining plaintiff's objections to such questions propounded to the said Harry Younkins upon cross-examination by the defendant.

6. The Court erred in refusing to permit defendant's witnesses to state whether, in their opinion, the Marion steam loader was a reasonably safe machine for the purpose of skidding logs within a radius of five hundred feet, and in sustaining plaintiff's objections to such questions propounded by the defendant, said witnesses having shown that they were thoroughly experienced in work of that character, had full knowledge thereof, and were qualified and competent to express their opinion on the subject.

7. The Court erred in ruling that the question of whether the Marion steam loader was a reasonably safe machine for the purpose of skidding logs within a radius of five hundred feet was for the jury to decide, and that it was not a subject for expert testimony.

8. The Court erred in permitting plaintiff to prove, over defendant's objections, the use of a haul-back line and signal wire in skidding logs, and the effect a haul-back line and signal wire could or would have upon the movements of logs being skidded by a machine equipped with a signal wire and haul-back line.

9. The Court erred in instructing the jury that "The question still remains for you to answer, viz., whether this method (without the use of a haul-back line) was more hazardous than the other referred to, viz., with a haul-back," for the reason that such instruction did not correctly state the law, but tended to mislead the jury as to the master's duty relative to furnishing his servant with a reasonably safe

place to work [26] and reasonably safe tools and appliances.

R. L. BLACK and
CANNON, FERRIS & SWAN,
Attorneys for Defendant.

I hereby certify that the within petition for new trial was by the defendant on this day presented to me for my certificate allowing the same to be filed, and I hereby certify that I allowed the same to be filed.

Dated this 2d day of December, 1913.

FRANK S. DIETRICH,
Judge.

Due service of the within Petition by receipt of a true copy thereof, admitted this 2d day of December, 1913.

ELDER & ELDER,
Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 2, 1913. A. L. Richardson,
Clerk. [27]

Order Denying Petition for New Trial.

At a stated term of the District Court of the United States for the District of Idaho, held at Coeur d'Alene, Idaho, on Tuesday, the 2d day of December 1913. Present: Hon. FRANK S. DIETRICH, Judge.

No. 553.

SUSAN HARKINS

vs.

POTLATCH LUMBER COMPANY.

On this day the defendant's motion for a new trial came on to be heard and after argument by Charles E. Swan, Esq., on behalf of defendant, and the motion, and Robert H. Elder, Esq., against said motion, the Court being fully advised in the premises, ordered that said motion for new trial be and the same is hereby denied. To which ruling the defendant by its counsel then and there excepted in due form of law, which exception is allowed. [28]

*In the United States District Court for the District
of Idaho, Northern Division.*

SUSAN HARKINS,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Bill of Exceptions.

BE IT REMEMBERED that this cause came on to be heard at Coeur d'Alene, Idaho, in the above court, before Honorable FRANK S. DIETRICH, Judge, and a jury, the plaintiff being represented by Messrs. Elder & Elder, and the defendant by Messrs. Cannon, Ferris & Swan (by Mr. Swan), on the 20th day of November, 1913, and the following proceedings were had, to wit:

A jury of twelve men was duly and regularly empaneled and sworn to try said cause. [29]

[Testimony of William Bailey, for Plaintiff.]

WILLIAM BAILEY, a witness duly called and sworn on behalf of the plaintiff, testified as follows, on

Direct Examination.

(By Mr. ELDER.)

Q. You may state your name.

A. William Bailey.

Q. Where do you reside? A. Bovill.

Q. Were you working for the Potlatch Lumber Company on or about November 9th, 1910?

A. Yes, sir.

Q. At the time Mr. Harkins received the injuries from which he died? A. Yes, sir.

Q. What were you doing at that time, Mr. Bailey?

A. I was running the loader.

Q. How? A. Running the loader.

Q. What kind of a loader? A. Marion loader.

Q. Will you describe that machine to the jury?

A. Well, it is a machine used for loading logs.

Q. How is it equipped, Mr. Bailey?

A. With a pair of tongs and a cable, is about all.

Q. What kind of a machine is it?

A. It is a Marion steam loader.

Q. Is it run by steam? A. Yes, sir.

Q. Is it equipped with a drum for the purpose of rolling the cable on the drum? A. Yes, sir.

Q. What sized cable does it use?

A. It uses five-eighths. [30]

Q. What size cable was on this machine at that time? A. Five-eighths.

(Testimony of William Bailey.)

Q. Where does this machine sit, where is it used?

A. It sits on a car.

Q. How is it transferred from one car to another, or is it transferred from one car to another?

A. Yes, sir.

Q. How is it transferred, Mr. Bailey?

A. By means of a cable.

Q. A track laid from one car to another, and then run on the track, is it? A. Yes, sir.

Q. Does this machine sit on trucks on a flat car?

A. Yes, sir.

Q. What were you doing on the day this man was injured, Mr. Bailey? I will withdraw that question.

A. We were skidding.

Q. Describe to the jury now, how this injury occurred, Mr. Bailey.

A. Well, we were skidding, and they fastened the tongs on to a log and gave the signal.

Q. How did they get the line out to fasten it on to the log? A. Pulled it out.

Q. Describe to the jury how they pulled the line out.

A. Well, they take the line and pull it out into the woods and fasten it on to a log.

Q. How do they pull it out, Mr. Bailey?

A. The men pulled it out.

Q. How did the men station themselves along the line to pull it out? Were they all at the end of the line? Did they all take hold of the end of the line and pull it out?

A. Sometimes, and sometimes they don't.

(Testimony of William Bailey.)

Q. After they get the line pulled out, then what do they do?

A. They fastened the line on to the log and gave me the signal [31] to pull, and I started the log, and pulled it a little ways,—I forget just how far,—and the log started to run in behind a tree, and I saw that it was going behind the tree, and I stopped pulling the log, and the log ran down hill and upset the tree.

Q. Was this machine equipped with any haul-back line? A. No, sir.

Q. Could you see where the log was fastened,—where the line was fastened on to the log?

A. Yes, sir.

Mr. ELDER.—Mark this, please.

(A certain photograph was thereupon marked Plaintiff's Exhibit No. 1.)

Q. Mr. Bailey, I hand you Plaintiff's Exhibit, marked for identification No. 1, and ask you to state if that is a picture of a machine similar to the one which you were operating on that day.

A. Yes, sir.

Q. Do you know whether or not this is the same machine? A. No, sir, it is not.

Q. Is that machine constructed in the same way and equipped in the same way that the machine which you were working on was equipped? A. Yes, sir.

Q. Now, where was Mr. Harkins from the place where they hooked on to this log?

A. He was about halfway, if I remember right, between the loader and where they hooked on.

Q. Do you know why he was in that position?

(Testimony of William Bailey.)

Mr. SWAN.—Just answer that yes or no.

A. What was the question?

Mr. ELDER.—Q. Do you know why he was in that position, why he was in that place? [32]

A. No, I don't know as I do.

Q. Do you know why he was stationed at that point?

Mr. SWAN.—Just a moment. I object to that, if your Honor please, because he has just answered that he does not know.

The COURT.—Well, he may answer it again. Do you understand the question, Mr. Witness?

A. No, I don't.

The COURT.—Read the question to him.

(Last question read.)

A. Well, no, I don't know as I do, unless—

Mr. SWAN.—Just a moment. I object to anything further than that.

Mr. ELDER.—He was there running the machine?

The COURT.—You may ask him the question in a different way. Ask him whether he directed him to—

Mr. ELDER.—Q. Mr. Bailey, were any of the men directed to take a position between the place where you were hooking on to the logs and your loading machine?

Mr. SWAN.—That is objected to as immaterial, unless it is confined to this particular occasion.

Mr. ELDER.—Q. Well, at that particular time?

The COURT.—Overruled.

(Testimony of William Bailey.)

that ground, for the reason that the witness has already stated that they were in sight of this particular instrument, and gave a signal. It does not make any difference how they would do if they were out of sight, because that question is not in this particular case. I cannot see that it is in any way material to the issues.

Mr. ELDER.—If your Honor please, they might have been in sight for that particular log, but the next log they might have been out of sight, and if a man was required to stand in a certain position along that line for the purpose of giving signals, I think we could show that, because he would be required to be there this time the same as any other.

The COURT.—The objection will be overruled.

Mr. SWAN.—An exception.

Mr. ELDER.—Read the question.

(Last question read.)

A. They would have to come down far enough out of the brush so that I could see them.

Q. Mr. Bailey, is there any means or device for controlling a log or for keeping it from running or sliding, on a Marion steam loader?

A. Off the hill? [35]

Q. Yes, sir. A. No, sir.

Q. Now, where were you at the time Mr. Harkins received the injury? A. In the machine.

Q. Who gave you the signal to pull the log?

A. I don't remember.

Q. You say Mr. Harkins was about halfway between where you were with the machine and where

(Testimony of William Bailey.)

they hooked on to the log? A. Yes, sir.

Q. What did you do after you stopped your engine, stopped pulling on the log?

A. Why, I asked the other fellows where Mr. Harkins was.

Q. Could you see him?

A. I saw him just a few minutes before that.

Q. Did you see him at the time you stopped the engine? A. No, sir.

Q. Did you get any signal to go ahead after you stopped? A. Yes, sir.

Q. Did you go ahead? A. No, sir.

Q. Why not?

A. Well, I knew that the tree fell in there somewhere where I saw him last, and I wanted to know where he was.

Q. What did you do?

A. Well, I asked the other fellows where Mr. Harkins was, and they came down off the hill, and I went up, the fireman and I, and found him there in the brush where the tree had hit him.

Q. Had he received injuries? A. Yes, sir.

Q. What was his condition at the time you got there?

Mr. SWAN.—It is admitted here, if your Honor please, that the man died as a result of the injuries that he received at that [36] time. I don't think it is necessary to go into details.

Mr. ELDER.—I don't know that it is admitted.

Mr. SWAN.—We will admit it then.

The COURT.—I understand now that the admis-

(Testimony of William Bailey.)

sion is that he was killed at that time by being struck by this falling tree?

Mr. SWAN.—Yes, your Honor.

Mr. ELDER.—I believe that is all.

Cross-examination.

Mr. SWAN.—Q. Mr. Bailey, you said you were operating that Marion loader for the Potlatch Lumber Company about June, 1910, until the present time? A. Yes, sir.

Q. You had operated Marion loaders in other localities? A. Yes, sir.

Q. For a good many years? A. Yes, sir.

Q. And other similar loaders? A. Yes, sir.

Q. And the Marion loader and other loaders of that similar character and description operated in much the same way, are in general use all over the country, are they not?

A. Yes, sir; especially in the east.

Q. Well, there are quite a number of them used out in this country, or haven't you been around to know?

A. Well, I know of two jobs, is all, in the west here.

Q. Similar to this? A. Yes, sir.

Q. Where were those?

A. Idaho and Washington Northern, and Spirit Lake, Idaho.

Q. There isn't any difference though in the manner of operating the Marion loader from that of various other makes, is there? A. Not very much. [37]

Q. They are all operated on the same principle?

A. Yes, sir.

(Testimony of William Bailey.)

Q. The main difference, if I understand it, is that the Marion loader has a revolving derrick?

A. Yes, sir.

Q. Or boom? A. Yes, sir.

Q. Now, you say you had a five-eighths cable on this machine that morning? A. Yes, sir.

Q. On the drum? A. Yes, sir.

Q. About what was the length of that cable?

A. I don't remember. We was using some two hundred and fifty to five hundred feet.

Q. Between two hundred and fifty and five hundred feet? A. Yes, sir.

Q. That was the extreme length of the cable?

A. Yes, sir.

The COURT.—You mean the cable was five hundred feet long?

A. Well, we used cables from two hundred and fifty to five hundred feet. I don't just remember the length of this particular line.

Mr. SWAN.—Q. It was somewheres between that?

A. Yes, sir.

Q. It would be in the neighborhood of three hundred to three hundred and fifty feet?

A. Yes, possibly four hundred or four hundred and fifty, I don't remember.

Q. How many men were working there on the logs at that time? A. How many men?

Q. Yes. A. Hauling the line out? [38]

Q. Yes. A. Three.

Q. Two besides Mr. Harkins? A. Yes, sir.

Q. How long had you been pulling those logs in in

(Testimony of William Bailey.)

this manner that morning?

A. I don't remember now.

Q. Well, can't you give me any idea as to what the length of time was? Was it an hour or two hours?

A. It must have been an hour or two hours, something like that, I guess.

Q. It might have been longer than that?

A. It might have been.

Q. How long had you been operating the loader at that particular place, how many days or weeks?

A. Well, I don't remember.

Q. Well, was it quite a while?

A. No, I don't think it was. If I remember right, we just commenced there that morning.

Q. You just moved there that morning?

A. Yes, sir.

Q. Now, these logs that you were pulling in by this Marion loader were scattered off in different directions, weren't they? A. Yes, sir.

Q. Kind of stray logs? A. Yes, sir.

A. And you were pulling them in that morning in the same manner that it was customary to do under the same circumstances, weren't you? A. Yes, sir.

Q. And you had been doing the same thing there at the Potlatch Lumber Company—in the woods there for the Potlatch Lumber Company, during all the time that you were operating [39] the loader, for about five or six months? A. No, sir.

Q. About how long had you?

A. I don't just remember how long we was skidding there.

(Testimony of William Bailey.)

Q. Well, was it a couple of months?

A. No, I don't think it was.

Q. Three weeks?

A. I don't know. I don't remember.

Q. Can't you give any idea at all, Mr. Bailey, as to how long you were operating the machine in the same manner it was being operated at the time of the accident?

A. I don't know as I could. I usually did the loading, and I never did very much skidding.

Q. I understood you said you didn't do very much skidding. How long had you been doing that skidding, if that is what you call it,—I mean hauling the logs in from different directions?

The COURT.—How long had you been skidding is the question. Can't you give him some idea how long it was?

A. We had possibly been at it two weeks, as near as I can remember; we might have been at it longer, and it might not have been that long.

Q. It was somewhere in the neighborhood of two weeks? A. Yes, two weeks anyway.

Q. Mr. Harkins was there with your crew all that time, was he not? A. Yes, sir.

Q. He had been working there with your crew for something like four or five months, hadn't he?

A. No, I don't think he was there that long.

Q. Well, three or four months, we will say?

A. I don't think he was there over two months; he might have been, though.

Q. He was there at least two months, and perhaps more?

(Testimony of William Bailey.)

A. Well, he might have been there longer. [40]

Q. Now, on this particular occasion, Mr. Bailey, I suppose that during the two hours or more that you were pulling these logs in, the men would carry the cable out in one direction and hook on to a log, and you would pull it in, and then if there was a log over here in this direction you would do the same thing, and you kept dragging that line out and dragging those logs in in that way? A. Yes, sir.

Q. How far out did they go at this particular time?

A. Well, I don't just remember; it was possibly three hundred or maybe four hundred feet.

Q. Possibly three hundred feet? A. Yes, sir.

Q. Somewhere in the neighborhood of three hundred feet, you think they run that out?

A. It might have been four hundred feet; I don't remember.

Q. You think between three and four hundred feet would be pretty close to it?

A. I think it would.

Q. And I suppose you had to go out that far frequently that morning; in other words, it would simply depend on how far the logs were out, wouldn't it? A. Yes, sir.

Q. And you did that morning the same thing, you went out that far that morning? A. Yes, sir.

Q. Several times, on several occasions?

A. Yes, I think we did.

Q. And now when these men pulled this hook out this particular time and hooked the log on, somebody gave you a signal? A. Yes, sir.

(Testimony of William Bailey.)

Q. And they were in plain view? A. Yes, sir.

Q. You could see them? [41]

A. I could see them, yes, sir.

Q. You don't know whether that was Mr. Harkins or whether it was one of the other men?

A. I don't know; Mr. Harkins wasn't up as far as they were.

Q. He didn't go up as far as they were?

A. No, sir.

Q. Did he start to pull out the hook with these men?

A. I don't remember; I think he did, though.

Q. But he didn't go as far as they did?

A. No, sir.

Q. When he got out some distance what did he do?

A. Well, the last I saw of him he was standing on a log.

Q. Standing on a log?

A. Yes, sir, on a tree that had fallen cross-ways of the—

Q. How far was he at that time from the cable by which you were pulling in this log?

A. Oh, it must have been forty or fifty feet, possible sixty feet.

Q. Off to one side? A. Yes, sir.

Q. How long had he been there?

A. Not very long.

Q. How? A. Two or three minutes, maybe.

Q. How long?

A. Two or three minutes; he might have been there longer than that.

(Testimony of William Bailey.)

Q. He was standing there when you last saw him?

A. Yes, sir.

Q. Prior to the accident? A. Yes, sir.

Q. Was that before or after you had started to pull the log in? A. That was before. [42]

Q. After you started to pull the log in you didn't see anything more of him?

A. I looked over to this tree out in the brush, and he was out of sight.

Q. That was before you started to pull the log in, he disappeared from your sight off to one side, say fifty or sixty feet? A. Yes, sir.

Q. And you didn't see anything more of him?

A. No, sir.

Q. Now, I presume, Mr. Bailey, that when you speak of skidding you mean pulling in great big bunches of logs from a way out in the woods, don't you? Is that what you mean by skidding?

A. I never saw them haul in very big bunches.

Q. Well, they run a cable a way out in the woods, clear out of sight, don't they, and hook on to logs with a donkey-engine, that is what you call skidding, isn't it? A. Yes, sir, I think it is.

Q. And frequently, I presume, out there in the woods with this donkey-engine they have side lines that they run off to one side?

A. I think they have. I don't know a thing about a donkey. I think they have; I don't know.

Q. You never have run a donkey-engine?

A. No, sir.

Q. The only thing you have run is these loaders?

(Testimony of William Bailey.)

A. Yes, sir.

Q. I suppose the logs when they are brought in, and the crew of loaders comes down to load them on the cars, there is a big bunch of logs lying right up close to the track, and those are the logs you proceed to load on to the cars?

A. Not in all cases. The donkeys usually load their own logs. [43]

Q. When you load with a Marion loader, is that the way you do it?

A. Yes, sir, they are usually hauled in with teams or something of that sort.

Q. Don't they skid them in with a donkey-engine?

A. They load them themselves with it.

Q. But, I say, when you got there this morning, or day after that when you were using this loading machine, the logs would be piled up around it for some distance, wouldn't they, to load them on to the cars? A. Yes, sir.

Q. I suppose that you couldn't get them all in one pile right up close to the track, could you?

A. They usually get them up pretty close.

Q. I suppose that is true, but which would you load first, those right up close to the track?

A. Well, it all depends on whether you have experienced hookers or green men.

Q. Give me an idea of what the customary way was. A. Generally commenced close to the track.

Q. You would load them? A. Yes, sir.

Q. Then you would gradually spread out a little further with your cable and pick up those further

(Testimony of William Bailey.)

away and pull them in? A. Yes, sir.

Q. And, as a matter of fact, you kept that going that way as far out as the cable would reach, wouldn't you? A. Most generally, yes.

Q. And you did that on this occasion?

A. We had on a longer line.

Q. How long had you had this longer line on?

A. From the time we started to work up there.

[44]

Q. For two or three weeks?

A. Possibly two or three weeks.

Q. That ain't what I say; you had a longer line on for two or three weeks than you had used before that? A. Yes, sir.

Q. After you loaded those right close to the track, it was the custom to run these lines out and pick up these other logs any distance they were out to the length of the cable? A. Well, not in all cases.

Q. I am not asking you in all cases. I am asking you what was the general custom?

A. As a general thing we pick them clean as we go along.

Q. And as far out as you could reach with the cable you had you would pull those logs in and load them up on the car, if you needed them to fill up a load, isn't that true? A. Yes, sir.

Q. As a matter of fact, you were doing this work that morning just the same as you had been doing it right along?

A. We were just skidding the logs in. I don't think we were loading them that morning.

(Testimony of William Bailey.)

Q. You hadn't got to the point of loading?

A. No, sir.

Q. You were getting them to the point where you could load them? A. Yes, sir.

Q. You had not loaded any that morning at all, had you?

A. I don't think we did; I don't remember.

Q. As I understood you to say, the different loading machines were operated practically in the same manner?

A. All those with a revolving drum, revolving boom, that is all I know anything about.

Q. You never operated any other except the Marion? A. The Marion and the Barnhart loader.

[45]

Q. And that also had a revolving boom?

A. Yes, sir.

Q. Did you ever see the others in operation?

A. I never saw them load any with the others, only just a log now and then.

Q. How?

A. Just once in a while a log that happened to be going by.

Q. When you saw those, they were used in the same way in the same manner and used for the same purposes as you used the Marion loaders?

A. You mean the Marion?

Q. No, those others. Didn't you say you had seen others in operation?

A. Well, just once in a while, just seen them loading a log occasionally; I didn't know anything about them.

(Testimony of William Bailey.)

Q. How many kinds are there with the revolving boom,—just the two?

A. Well, there is three that I know of.

Q. Three? A. Three different kinds.

Q. The Marion and the American—

A. And the Barnhart.

Q. Well, they are all operated the same way?

A. Yes, sir.

Q. Used in the same manner and for the same purposes? A. Yes, sir.

Q. In pretty general use all over, aren't they, so far as you know? A. So far as I know. [46]

Q. Now, in these various times that you were doing this work in the same manner and during the past two weeks, pulling these logs in just short distances, you did not have any signal wire on your machine? A. No, sir.

Q. You did not have any haul-back? A. No, sir.

Q. And you were operating it this morning just the same as you had? A. The same, yes.

Mr. SWAN.—That is all.

Redirect Examination.

(By Mr. ELDER.)

Q. Mr. Bailey, you never loaded at the same time that you were skidding?

A. Well, sometimes we did and sometimes we didn't.

Q. You were not at this time? A. I think not.

Mr. ELDER.—I offer in evidence Plaintiff's Exhibit No. 1.

Mr. SWAN.—You said that that was practically

(Testimony of William Bailey.)

the same kind of a machine as the one you were operating? A. Yes, sir, the same thing.

Mr. SWAN.—No objections.

Mr. ELDER.—Q. What length of cable did you usually use when you were loading, Mr. Bailey?

A. Different lengths, from one hundred and fifty feet to two hundred and fifty.

Mr. ELDER.—That is all.

Recross-examination.

(By Mr. SWAN.)

Q. Mr. Bailey, this same cable you used for loading too, didn't you, that you had on there? [47]

A. Yes, sir.

Q. It did not make any difference whether it was longer or shorter, you could load with it just the same?

A. You could, only you didn't have as much power with your machine, that is all.

Q. That is the only difference? A. Yes.

Q. You didn't have any difficulty in loading, just the same, did you? A. No, sir.

Q. Sometimes, you say, you would load when you skidded and sometimes you didn't. I presume that would depend on your own convenience, whether or not the work could be better facilitated in one way or the other; isn't that that fact?

A. Well, as a general thing when we didn't load we were short of cars or something like that.

Q. That is when you would use this machine to pull in the logs instead of loading them right away, and leave them there until the cars came? A. Yes, sir.

(Testimony of William Bailey.)

Q. In other words, it would all depend upon the convenience of doing the work at the time, whether you had cars or anything of that kind; you did not have any set rules about that, did you?

A. No, I don't know as there was.

Mr. SWAN.—I think that is all.

Mr. ELDER.—That is all. [48]

[Testimony of Harry Younkin, for Plaintiff.]

HARRY YOUNKIN, a witness duly called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. ELDER.)

Q. You may state your name to the reporter.

A. Harry Younkin.

Q. What is your occupation, Mr. Younkin?

A. Foreman.

Q. For whom? A. Potlatch Lumber Company.

Q. How long have you been working for the Potlatch Lumber Company?

A. Two years the first of last May.

Q. Were you working for the company at the time of the injury to Mr. Harkins, in this case?

A. Yes, sir.

Q. Are you still foreman for the Potlatch Lumber Company? A. Yes, sir.

Q. And you have been working for them ever since the injury in this case? A. Yes, sir.

Q. Are you related either by marriage or blood to the plaintiff in this case? A. Yes, sir.

Q. What relation?

A. She is my mother in law.

(Testimony of Harry Younkin.)

Q. Do you remember when this injury occurred?

A. Yes, sir.

Q. When was it?

A. Two years ago the ninth of this month.

Q. What were you doing at that time, Mr. Younkin? A. What were I doing?

Q. Yes, what was you doing at that time? [49]

A. I was foreman.

Q. Of what? A. Of the camp—logging camp.

Q. What were you doing at the camp? What was the camp doing?

A. Skidding logs, cutting logs.

Q. Are you acquainted with the place where this injury occurred?

A. Yes, sir, it happened right close to the camp.

Q. You may describe the position of the machine and the condition of the land and surroundings there to the jury.

A. Well, they were skidding with a log-loading machine this morning. The ground was just a little up-hill; I don't know how steep it was.

Q. How steep would you in your opinion, say it was, Mr. Younkin?

A. Oh, probably eight or ten per cent; maybe not so steep, maybe steeper.

Q. Well, where were they getting the logs from the railroad, or from the machine,—up on the hill?

A. Yes, sir.

Q. How far were they going out that morning after logs?

Mr. SWAN.—You have not shown, Counsel, that

(Testimony of Harry Younkin.)

this man was there that morning.

Mr. ELDER.—Q. Where were you—were you there at any time that morning?

A. I was there before the accident happened; I was there before they spotted the machine.

Q. How long?

A. I probably had gone away from there forty minutes or probably a little longer, to the best of my knowledge.

Q. How far were they going out that morning for logs?

Mr. SWAN.—That is objected to as immaterial.

The COURT.—It is preliminary. He may answer the question.

A. Of course, I couldn't say how far it was. [50]

The COURT.—Oh, about how far?

A. Probably three hundred and fifty to four hundred and fifty feet, to the best of my knowledge.

Q. Now, what kind of a machine were you skidding with that morning?

A. Marion steam log loader.

Q. How is that machine equipped?

A. Well, it is a machine that swings around, sits on a truck and swings around on a car either way, and it has a drum in it, what we call a hoisting drum, used for hoisting, and so on.

Q. It is run by steam? A. Yes, sir.

Q. What size cable did it have on it at this time?

A. Five-eighths.

Q. Was this machine equipped with a haul-back line? A. No, sir.

(Testimony of Harry Younkin.)

Q. Was it equipped with a whistle-cord, or a whistle-line? A. No, sir.

Q. Was it equipped with any signal device?

A. Nothing only giving signals by hand, that is, in skidding.

Q. How did you get the line up to where the logs were, Mr. Younkin?

A. There was only one way to get it out, and that was to pull it out by hand with men.

Q. Were they doing that that morning?

A. Yes, sir.

Q. Will you state to the jury what your instructions were with regard to pulling the line out, how they pulled it out? State what positions they took when they pulled it out.

A. That depended on the men they had. There were three of these this morning. [51]

Mr. SWAN.—I object to that as incompetent, irrelevant and immaterial, unless it is shown by this witness that he gave instructions at this particular time.

The COURT.—Well, I assume that you are now asking for instructions to these particular men.

Mr. ELDER.—Yes, your Honor.

Mr. SWAN.—Oh, all right.

The COURT.—You will understand, Mr. Younkin, that the question seeks information as to the instructions you gave to those particular men?

A. Well, we had no cars to load, and I gave these men instructions to move their jammer down there and skid off to the hill back of the camp, which they

(Testimony of Harry Younkin.)

did. I told them that there were only three men, and they would have to take the cable out themselves.

Q. When there were only three men, what was—how did they take the cable out? Did they all go from the end of it?

A. No, sir; they generally would divide up equally; it depended on the distance they were going, probably fifty or one hundred feet apart.

Q. Were the men required to station themselves in any particular place for the purpose of giving signals?

Mr. SWAN.—I object, if your Honor please, as leading and suggestive. I think we should have what the instructions were.

The COURT.—Overruled. Answer the question.

A. Yes, they would have to—if they couldn't see the engineer, they would have to get apart so they could see to give signals.

Q. Were they required to do that by you and the company, in order to give signals?

A. Yes, sir; I told them this morning that they would have to get apart. Of course, a couple of them had skidded before.

Q. What duties was Mr. Harkins employed for?
[52]

A. Top loader.

Q. What are the duties of a top loader?

A. That is loading logs on cars.

Q. Where does he work?

A. He works on top, takes the logs out and builds the load.

(Testimony of Harry Younkin.)

Q. You mean, he places the logs on top of the cars?

A. No, the engineer does that, but he is up there to take the logs up and build the load. The engineer is supposed to put the logs where he wants them.

Q. Was Mr. Harkins employed about your camp prior to the time he was put on here as top loader?

A. Yes, sir.

Q. What was he employed for?

A. Well, sir, at the time that I went up in there and I took this camp, he was employed there as a carpenter in building a barn and fixing up tents around the camp, or camping ground there.

Q. Did you give Mr. Harkins any instructions on this morning of the ninth regarding what he should do?

A. Yes, sir; I told him he would have to go out and skid.

Q. Why did you have him skid?

Mr. SWAN.—I object to that as immaterial. If he told him, that is sufficient.

The COURT.—Yes, I think so.

Mr. ELDER.—Q. How long had you known Mr. Harkins, Mr. Younkin?

A. About twenty years.

Q. What was his occupation?

A. Well, sir, he was a millman, in business at one time for himself, and laid around in the summer. I understand that he used to file saws.

Q. Well, was he ever a scaler?

A. Yes, sir, he scaled for the Idaho-Washington Northern [53] Railway Company.

(Testimony of Harry Younkin.)

Q. How long did you say you had known him?

A. About twenty years.

Q. During that time had Mr. Harkins ever worked around a Marion loader, to your knowledge?

A. Not to the best of my knowledge, outside of scaling.

Q. How long have you been engaged in logging operations, Mr. Younkin?

A. About twelve years.

Q. How long have you been acquainted with the Marion steam loader, and loaders of its class and type?

A. About twelve years.

Q. With what company?

A. Well, I have worked for the Idaho and Washington Northern, worked for different companies in the east, Cherry River Boom & Lumber Company, Central Pennsylvania Lumber Company.

Q. While you was working for the Potlatch Lumber Company did you have charge of any skidding machine of the type which were equipped with haul-back line and signal wire?

A. Yes, sir, I had one.

Q. You may describe to the jury what the use of a haul-back line is.

Mr. SWAN.—Just a minute. I object to it as incompetent, irrelevant and immaterial, if your Honor please, and it doesn't tend to prove any negligence, or any fact upon which negligence could be based in this action. It is concluded here that the Marion steam loaders didn't have a haul-back line, and how another machine is equipped with a haul-back line

(Testimony of Harry Younkin.)

can't, to my notion, be in any way material in this case.

The COURT.—Overruled.

Mr. SWAN.—An exception. [54]

The COURT.—Answer the question.

A. Of course, a haul-back line is supposed to take it out around a piece of timber and bring it back; connected on to the main line, which is supposed to take the main line out in the woods.

Q. Is there any other use for it, Mr. Younkin?

A. Yes, I think it has a tendency to hold the logs. They all come down one road generally with a donkey.

Q. Describe to the jury how a machine of that character and type is operated.

A. It is operated by steam, with two drums.

Q. How are the lines fastened? You say they run around in the woods. Are they fastened in any way?

A. They are hung up in blocks, whenever they think it is necessary to hang them up to keep them off the rock and ground and so on and brought down to the main line and put on to a chain there. The main line and the haul-back line are both connected on to this chain, and from this a choker is hooked on the logs and hooked on to this chain.

Q. Are the engines equipped with any machinery such as *brak* brakes? A. Yes, sir.

Q. What is the use of the brake?

Mr. SWAN.—The same objection, if the Court please.

The COURT.—Overruled.

(Testimony of Harry Younkin.)

Mr. SWAN.—An exception.

A. A brake is to hold the drum. For instance, you throw out slack and want to stop the drum, you put on the brake.

Q. If you would use that brake, can you stop your main line and hold a log which would be fastened on to that line, with your haul-back line?

A. Well, that would depend on what size log it was. You could either hold the log or break your line.

Q. What size line is used as a haul-back line on those [55] machines, skidding machines?

A. Well, from half inch to five-eighths. On small donkeys I believe they have half-inch, and the large ones five-eighths.

Q. The line you were using on the Marion loader for skidding purposes was five-eighths, was it?

A. Yes, sir.

Q. Are these lines on the other machines of the same type and class as that line?

A. I presume they are, to the best of my knowledge.

Q. Then you say you could either hold—do you know the size of the log which they had hooked on to this line that morning? Do you remember seeing that log?

A. Yes, sir, I see the log, but I don't remember how big it was—probably sixteen or eighteen inches top and—

Q. And how long was it?

A. I presume probably thirty-two feet.

Q. Now, if this was hooked on to a log of that

(Testimony of Harry Younkin.)

character, the main line, could you stop that log and your main cable with your haul-back line?

Mr. SWAN.—If the Court please, I object to that as calling for a conclusion of the witness, and speculative, merely, and incompetent, irrelevant and immaterial. This man wasn't there at the time this accident happened, and he said he had been away from there nearly an hour. What could have been done under such conditions, in his opinion, seems to me to be utterly immaterial in this case.

The COURT.—Objections the same.

Mr. ELDER.—Q. Mr. Younkin, if this Marion steam loader had been equipped with a haul-back line, or if the company had been using the kind of a machine which is usually used for the purpose of skidding, could this 32 foot log have been stopped by the engineer?

Mr. SWAN.—That is objected to as incompetent, irrelevant, and immaterial, calling for a conclusion of the witness, and [56] it is not based upon any facts introduced here in evidence.

The COURT.—I think I will let him answer that.

Mr. SWAN.—An exception.

The WITNESS.—What was the question?

(The last question read.)

A. I presume it could, either that or break the line.

Q. Do you know whether or not the Marion steam loader and loaders of that class are generally or commonly used by logging companies for the purpose of skidding logs in this community?

A. Not to the best of my knowledge.

(Testimony of Harry Younkin.)

Q. Now, Mr. Younkin, if this machine, this Marion steam loader, had been equipped with a signal device such as a whistle-cord, would it have been necessary to station anyone between the places where you were hooking on to the log and the engine for the purpose of giving signals?

Mr. SWAN.—I object to that as incompetent, irrelevant, and immaterial, and for the further reason that there is no evidence here at all, if the Court please, that this man was stationed there by the direction of anybody, no evidence here to show why he was there. In fact, it is shown by the only testimony on the subject that he had nothing to do there, and it seems to me that whether or not it would be necessary to place a man in this position or that position under such circumstances is in no way material to the issues in this case.

The COURT.—I think I shall sustain this objection, at least until it is more definitely shown what the duties of this man were, and why he was there, and whether it was necessary for him to be there.

Mr. ELDER.—Q. Mr. Younkin, did the company require the men who were hauling out the cable from this Marion steam loader to station themselves between the place where the engine was located and the place where they were hooking on to the logs, for the purpose of giving signals? [57]

Mr. SWAN.—That is objected to as incompetent, irrelevant, and immaterial, and for the reason that the testimony shows that this man was out fifty or sixty feet to one side of the line, where he had no

(Testimony of Harry Younkin.)

occasion to be, and in plain view of the engineer at that time.

The COURT.—Overruled.

Mr. SWAN.—An exception.

Mr. ELDER.—Read the question.

(Last question read.)

A. Certainly. There was no other way to give signals, only that way, to be stationed along the line, unless it was clear, that the engineer could see from the engine to the log, if there was no brush. If there was brush they had to be stationed there in order to give the signals, or somewhere in sight.

Q. Isn't it a fact, Mr. Younkin, that in carrying out—

The COURT.—Don't lead the witness.

Mr. ELDER.—Q. Well, Mr. Younkin, state how the men carried out the haul-back line,—I mean the main line on this machine, the Marion loader.

Mr. SWAN.—He has already answered that.

Mr. ELDER.—I don't think I asked this witness.

The COURT.—Well, let him answer again.

A. Well, they get a reasonable distance apart, so that each man has his share of cable to take; it depends on how far they are going out.

Q. Well, if they were going out four hundred and fifty feet, how far apart would they get?

A. They would be a reasonable distance apart, probably fifty or one hundred feet apart, so that each man would take his share of the weight.

Q. What were the instructions to the men? What were their duties after they got the line out?

(Testimony of Harry Younkin.)

A. It was the duty of one of them to fasten it on to the log. [58]

Q. What were the duties of the others?

A. The duties of the others was, when they were ready, to give signals.

Q. Where would they stand?

A. If they couldn't see one another from where they were they would have to go where they could see the engineer and see one another.

Q. Were they required to stand close to the line?

A. No, sir, they were not. I gave those men all instructions to get a reasonable distance from the line in skidding.

Q. Did you give them any instructions as to what was a reasonable distance?

A. No, sir, I did not. I supposed they should know that.

Q. Now, Mr. Younkin, you may state from your experience and knowledge of logging and these machines, if this Marion steam loader had been equipped with a haul-back line, or if this company had been using a machine which is commonly and usually used for skidding purposes, if the engineer could have stopped this 32-foot log with this haul-back line and the brakes on his engine.

Mr. SWAN.—I object to that as incompetent, irrelevant, and immaterial, calling for an opinion of the witness, and on the further ground that it has been shown conclusively that the Marion steam loader is never equipped with a haul-back line under any conditions or circumstances, and it was not necessary.

(Testimony of Harry Younkin.)

The COURT.—The objection is sustained on the ground that the same question has already been answered.

Mr. ELDER.—I thought you sustained the objection, your Honor, to the other question.

The COURT.—No. The objection I sustained was to the signal-cord, that is, you asked this question before, which was permitted to be answered.

Mr. ELDER.—Yes, I beg your pardon, I remember now. [59]

Q. Mr. Younkin, if this engine had been equipped with a whistle-cord for signalling device such as is commonly used on skidding machines, would it have been necessary to station a man for the purpose of giving signals between the point where they hooked on to the log and the engine?

Mr. SWAN.—That is objected to as repetition and incompetent, irrelevant, and immaterial, and for the further reason that it does not appear from the evidence that this man was in any position such as he describes.

Mr. ELDER.—The evidence shows that he was about halfway.

The COURT.—Overruled.

Mr. SWAN.—An exception.

A. No, it wouldn't be necessary.

Mr. ELDER.—Q. On the machine equipped with a whistle-cord how is the signal operated?

A. On a donkey, you mean?

Q. Yes, or on a machine equipped with—

A. There is a whistle wire stretched from the

(Testimony of Harry Younkin.)

donkey back into the woods.

Q. Who operates the wire?

A. The whistle-boy.

Q. How does he operate it?

A. He operates it through a hook-tender or rigging slingers.

Q. Do you mean, Mr. Younkin, that they tell him when to give the signals and what signals to give?

A. Yes, sir.

Q. How does he signal, how does he give the signal?

A. That depends on what signals they want.

Q. Well, any signal. How does he operate the signals in sight?

A. He hits the wire, if they want one whistle, he hits the wire once, and if they want two, he hits the wire twice.

Q. Where is he placed with reference to where they are getting the logs?

A. That depends on the location of where they are skidding from. [60]

Q. Do they place him in the immediate vicinity of where they are getting the logs?

A. They place him out in the woods a certain distance away from the line.

Q. Does he have to be where he can see them getting the logs?

A. No, sir, he does not have to be where he can see them; he has to be within hearing distance of either the hook-tender or rigging slingers.

Q. Where a machine is equipped with a haul-back

(Testimony of Harry Younkin.)

line and a whistle-cord, where does the whistle-boy stand, and where is his position with reference to this line? A. Well, it is out to one side of the line.

Q. Did I ask you if this Marion steam loader was commonly or generally used by—

A. I don't remember whether you did or not.

Q. By logging companies in this community?

The COURT.—I don't think that in itself would be a criterion. The question is whether it is commonly used by logging companies, unless there is some distinction in conditions here in one country as another.

Mr. ELDER.—Q. You may state, Mr. Younkin, whether or not the Marion steam loader, or loaders of the same character and kind as that, are generally used by lumbering companies in their operations for the purpose of skidding logs.

A. Not where I have worked elsewhere, to the best of my knowledge.

Q. When loading logs, Mr. Younkin, how far do the companies usually go with a loader for the logs?

A. That depends; most companies that I have worked for went from sixty to seventy-five feet.

Q. Do you know of any company, or whether or not the companies generally operating in logging have any limit to the distance that they go for skidding logs? [61] A. Some companies do.

Q. I mean for loading logs?

A. Some companies do.

Q. What is the distance?

Mr. SWAN.—I object to that as immaterial and

(Testimony of Harry Younkin.)

incompetent and irrelevant.

The COURT.—I think it is objectionable, unless you can show a general custom. The mere fact that one company or two companies may limit the distance would not be a criterion or a measure of that which is careful and that which is careless.

Mr. ELDER.—Q. You may state, from your knowledge, Mr. Younkin, and from your experience, whether or not companies generally have a limit on which they will go for logs for loading purposes with machines such as the Marion steam loader.

The COURT.—Just answer yes or no.

A. I did not understand the question.

Mr. ELDER.—Read the question.

(Last question read.)

A. Yes, sir.

Q. What is that distance?

Mr. SWAN.—That is objected to as incompetent, irrelevant, and immaterial, no proper basis laid for the question.

The COURT.—Overruled.

Mr. SWAN.—An exception.

A. Sixty to seventy-five feet.

Mr. ELDER.—I believe that is all.

Cross-examination.

(By Mr. SWAN.)

Q. I understood your last answer to the effect that you think the limit they would go out when loading logs would be from sixty to seventy-five feet. That is what you said, wasn't it?

A. From sixty to seventy-five feet in loading logs.

(Testimony of Harry Younkin.)

Q. That is when you are loading logs? [62]

A. Yes, sir.

Q. On this particular day, you were not loading logs, were you? A. No, sir.

Q. You had not been at all that morning?

A. Not to the best of my knowledge.

Q. How long, Mr. Younkin, had you been working as a foreman for the Potlatch Lumber Company at this time? A. From the first of May.

Q. From the first of May? A. Yes, sir.

Q. During that time you had been in charge of this same camp, or had you been at another camp?

A. I had been in charge of loading logs.

Q. At this particular camp?

A. No, sir, all along the line.

Q. Did you go from one camp to another?

A. We was loading on the main line of the W. I. & N., and branches off the main line.

Q. In other words, you had charge of the Marion loader, and you were also in charge of a loading crew? A. Yes, sir.

Q. It was your purpose, or the main duty that your crew had was to go from place to place and load logs with this Marion loader? A. Yes, sir.

Q. You had been doing that, I presume, for several months?

A. Well, from the first of May up till October, if I remember right.

Q. Now, how long had Mr. Harkins been working for you prior to the accident?

A. I just forget when he first came to work for me;

(Testimony of Harry Younkin.)

I [63] think it was in July.

Q. Give me an idea. Four or five months?

A. I should say just about four or five months.

Q. About four or five months? A. Yes, sir.

Q. And he, I presume, went around with your crew from one camp to another, as it was necessary for you to do the work? A. Yes, sir.

Q. He was with you during all that time on the loader? A. No, sir, not on the loader.

Q. Where was he? Was he away from the loader all the time?

A. Well, part of the time he were and part of the time he weren't.

Q. What was he doing when he was away from the loader?

A. The first month or so he worked around.

Q. Then what did you put him at?

A. Then I put him at building a barn and fixing up camps.

Q. Then what did you put him at?

A. Then I put him on to this loader as top loader.

Q. He had been there how long?

A. Top loading?

Q. Right there with the loader; yes, sir.

A. I should judge, when I changed him from the camp to that he had been there about two weeks or such a matter, I don't just remember.

Q. How long have you been in the logging business?

A. Well, I have worked in the logging woods around different places, logging, about twelve years.

(Testimony of Harry Younkin.)

Q. Where did you work before you went to the Potlatch Lumber Company?

A. Idaho and Washington Northern. [64]

Q. That was the Blackwell Lumber Company, was it?

A. I worked for the railroad company on those jammers they had over there loading logs for the Panhandle Lumber Company.

Q. Near Spirit Lake? A. Yes, sir.

Q. How long did you work there?

A. Well, sir, about two years, a little over.

Q. Were you operating a Marion loader at that time?

A. I was working outside at that time, top loading.

Q. You were on a Marion loader, weren't you?

A. Yes, sir.

Q. And had about two years' experience with a Marion loader there before you went to the Potlatch Lumber Company? A. Yes, sir.

Q. The Marion loader you had there was just like the one you were using at the time of this accident?

A. I think so.

Q. Operated in the same manner? A. Yes, sir.

Q. Had no signal cord? A. No, sir.

Q. You had no haul-back line? A. No, sir.

Q. Did you ever see a Marion loader or any other loaders similar to that that were equipped with a haul-back line or signal cord?

A. I never see any on a Marion loader.

Q. There wasn't any facilities for doing it, was there? A. No, sir, not for loading logs.

(Testimony of Harry Younkin.)

Q. When you were up there on the I. W. & N., I presume you loaded these logs in the same manner that you were doing at the time of the accident?

A. We were not loading no logs at the time of the accident. [65]

Q. I mean prior to the time of the accident, when you were loading, you did the work the same way?

A. Yes, sir.

Q. And these logs, I suppose some of them, quite a bunch of them, would be right up alongside of the track where you could get them handily and run them up on the car?

A. That is—what do you mean—at the Idaho?

Q. Yes.

A. Yes, there would be logs dragged sixty or seventy-five feet.

Q. And after you loaded those right close, you would run your line out a distance of sixty or seventy-five feet? A. Yes, sir.

Q. To get the other logs? A. Yes, sir.

Q. And you would do that around in all directions?

A. They were all skidded right in along the track. There was none supposed to be back over seventy-five feet.

Q. Suppose there was some back over seventy-five feet, would you leave them there?

A. Yes, sir.

Q. You wouldn't touch those? A. No, sir.

Q. You run this hook out, though, without a haul-back for that distance? A. Yes, sir.

Q. And also without a signal line?

(Testimony of Harry Younkin.)

A. Yes, sir.

Q. And aside from the fact that you didn't run it quite so far when you were up on the I. W. N. as you did down here on this occasion, the work was done in exactly the same manner, was it not?

A. Yes, sir. [66]

Q. Now, how much of the cable, did you have on the drum up there on the I. W. N?

A. I think one hundred and twenty-five feet, to the best of my knowledge.

Q. If you only run out sixty or seventy-five feet, why did you have so much cable?

A. When you go out there sixty or seventy-five feet, you have extra cable to pull in a bunch of them, put the cable around a bunch and drag them in, to save making so many trips.

Q. You would skid them in up close to the track and then load them from that place? A. Yes, sir.

Q. Now, at the time of the accident, Mr. Younkin, you didn't have any cars there I believe?

A. No, sir.

Q. How long was it since you had had any cars in that place?

A. If I remember right, we loaded the day before.

Q. And the cars were run out?

A. Yes, the engine come in that night and took them out.

Q. And there hadn't any more come in?

A. No, sir.

Q. The day before that did you have occasion to run the cable out any distance at all?

(Testimony of Harry Younkin.)

A. No, sir; if I remember right, we was loading right where the teams was skidding the day before.

Q. And you loaded all those logs?

A. I don't know whether we loaded them all; we loaded all the cars we had.

Q. Then the next morning you were waiting for some cars, and you told the men to skid these logs in?

A. Yes, sir. [67]

Q. Did you tell them how far they were to go out and skid the logs?

A. No, sir. All I told them was to go the full length of the cable.

Q. You told them to go the full length of the cable that morning?

A. Yes, we had this timber felled all up around the hill there, and it was all supposed to come out.

Q. Who did you give that instruction to?

A. To Mr. Harkins.

Q. To Mr. Harkins?

A. To all three of them; they were all three standing there.

Q. They were all there, and you told them all to skid these logs in, and they could go out as far as the end of the cable?

A. Yes, sir; I told them the logs all had to come in and they could go the whole length of the cable.

Q. And of course you wouldn't have done that if you had anticipated that there was any danger in going out that distance, would you? A. No, sir.

Q. As a matter of fact, when you gave instructions to these men to go out there, you thought it

(Testimony of Harry Younkin.)

was perfectly safe to go out and skid those logs in without a haul-back line just as far as the cable would reach?

Mr. ELDER.—I object to that as immaterial and not proper cross-examination.

Mr. SWAN.—This man, if your Honor please, was in charge there and he had been twelve years in this kind of work and he gave these men these directions to go *you* and do this work. Now, it seems to me that I have a right to show by him what the dangers were, if any. [68]

The COURT.—Overruled.

Mr. SWAN.—Read the question.

(Last question read.)

A. I thought it was to the best of my knowledge.

Q. You were basing that knowledge, weren't you, on twelve years' experience?

A. In fact, I never gave it a thought, whether there would be any danger or not; I didn't suppose there was.

Q. If you had anticipated that there would be any danger, you wouldn't have ordered the men to go out there, would you?

Mr. ELDER.—I object.

The COURT.—Sustained.

Mr. SWAN.—Q. Now, the only difference and the only greater danger there would be, would be the fact that the log would have to be pulled that greater distance, wouldn't it? The work is done the same way, whether you go out seventy-five feet or two hundred and fifty feet?

(Testimony of Harry Younkin.)

A. It generally is, yes, sir.

Q. And the only difference in the danger would be the fact that the log had to be pulled that much further? A. Yes, sir.

Q. I suppose up in the woods, Mr. Younkin, that the ground is uneven?

A. Certainly it is in all woods.

Q. It is rolling and hilly, and you have got to skid these logs along the ground as you find it, haven't you?

Mr. ELDER.—I can't see where that has any effect on this case.

Mr. SWAN.—You were describing the conditions up there.

The COURT.—Well, he may answer the question.

The WITNESS.—What is the question?

Mr. SWAN.—Read him the question.

(Last question read.) [69]

A. Certainly, you have got to get the logs.

Q. Now, in pulling this cable up, I suppose the men would place themselves along that cable in any position they considered was the best, to get the cable out there?

A. Yes, certainly; they couldn't all three, if they was going out five hundred feet, they couldn't all three take hold of the end of it.

Q. I am asking you. I never did that kind of work. That is the reason I am asking you. When they would get that out there, if one man happened to be at the end and the others back further, the others wouldn't go out there—they would stand there and

(Testimony of Harry YOUNKIN.)

wait for the other man to hook the cable on?

A. They couldn't *stand they* were when they pulled the line out. The chances are the log would come down that way. They would have to walk to one side or the other a reasonable distance.

Q. They would go a reasonable distance?

A. Yes, sir.

Q. They would pull the line in and the men would walk back behind the line and drag it out again?

A. Yes, sir.

Q. It was not customary at all for the engineer to start that line until he got a signal from one of the men?

A. No, sir.

Q. And if the man at the end of the line was in plain sight of him, when he hooked that line on to the log, there wouldn't be any occasion for anybody else giving him a signal, would there?

A. No, sir.

Q. The man who hooked the cable on to the log would be the natural person to give the signal, and to know when it was time to give the signal?

A. Why, yes, he would be supposed to know. I suppose that [70] all three took their turns that morning; they generally do.

Q. They took turn and turn about?

A. Yes, sir.

Q. That is what they had been doing before that, that was the custom?

A. Yes, sir.

Q. Now, whether or not a man was required to give a signal part way out, in any event, when the cable got out as far as they wanted to drag it he

(Testimony of Harry Younkin.)

would step to one side in order to get out of the way of the log?

A. Yes, sir, or wait until he got the signal from the other man that fastened on to the log, either one; it would depend on whether it was—

Q. And when he went off to one side he would do that in order to get out of the way of the log as it was pulled in? A. He was supposed to; yes, sir.

Q. And the distance he would go and the direction he would go and the position in which he would stand would depend a good deal on his own judgment, wouldn't it? A. I presume so.

Q. And if he thought that he wasn't far enough, or any of them weren't, that they weren't far enough away, they could go farther?

A. They could go further, certainly.

Q. In other words, Mr. Younkin, you didn't have any fixed and set rules as to how far a man should go out in order to be safe? A. No, sir.

Q. A man had to use his own judgment, the same as he does in every other kind of business, wouldn't he? A. I presume he would.

Q. Have you ever used any other loading machine, except the Marion? [71]

A. The Barnhart, built by the same people as the Marion; in fact, they are called the Marion now.

Q. Did you ever work on any others?

A. Nothing, only the Barnhart and the Marion.

Q. Did you ever see any others in operation?

A. Yes, sir.

Q. Where?

(Testimony of Harry Younkin.)

A. Well, about the only others I saw in operation was a Slide McGifford for the Potlatch Lumber Company.

Q. For the Potlatch Lumber Company?

A. Yes, sir.

Q. Then the only machines of that character that you have seen are this Marion loader that you were using at the time of the accident, and the Barnhart, which you were using—was using up at Spirit Lake?

A. No, sir, it was a Marion we was using at Spirit Lake.

Q. Where were you using the Barnhart?

A. In the east.

Q. Was that the only one you used in the east?

A. No, one company I worked for there had six.

Q. They were operated about the same as this?

A. Just about the same, apparently.

Q. And I suppose they used those back there pulling in logs for short distances, the same as they did here?

A. Yes, sir; seventy-five feet was supposed to be the limit.

Q. How much of a cable did they have there?

A. About one hundred and twenty-five feet.

Q. I suppose, though, you didn't have to take actual measurement how far you went out with a cable; if you thought you were seventy-six feet, you wouldn't stop, would you?

A. No, the foreman was generally supposed to step it off or measure it off and not allow the loading crews to go beyond that. [72]

(Testimony of Harry Younkin.)

years, isn't that the natural way you would do business, and isn't that the customary way of doing business?

A. I don't know whether it is customary but that is the way a man would do.

Q. That is the way you have always seen it done, isn't it? [74]

A. Certainly. A man that is foreman is supposed to get the logs as cheap as he can.

Q. And it wouldn't be practicable, would it, if you had two logs over here and two over here in this direction, and two over here, to take the time to run a haul-back line for this log and then take the time to run a haul-back line for this log, and then take the time to run a haul-back line for this log over here, it wouldn't be practicable, would it?

Mr. ELDER.—I object to that as incompetent, irrelevant and immaterial, and not proper cross-examination.

The COURT.—Of course, it isn't in evidence here yet that such a condition existed out there, but I can't anticipate what the showing will be on that point. He may answer.

Mr. SWAN.—Q. State, Mr. Younkin, whether it would be practicable to do that.

A. Yes, I think it would.

Q. It would be practicable to do what,—change the haul-back line?

A. No, not for one or two logs.

Q. That is what I am asking you. Would that be practicable?

(Testimony of Harry Younkin.)

Q. Did you ever see it done?

A. Not to the best of my knowledge.

Q. Now, as a matter of fact, isn't it true, Mr. Younkin, that at the time you instructed these men to pull these logs in here these distances, the logs were scattered in various directions?

Mr. ELDER.—I object to that.

A. Yes, the timber was felled on the sidehill, and from the branch clean down to the camp.

Q. They would run it out in one direction and swing the boom and run it up another way; isn't that the fact?

A. They were skidding right close to the camp, skidding off the sidehill.

Q. Isn't that the way they did it? [75]

A. Yes, sir.

Q. As a matter of fact, they were doing that work there that morning in the most practicable and customary and usual manner under the circumstances; isn't that true?

The COURT.—Isn't that very leading, Mr. Swan?

Mr. SWAN.—This is cross-examination, if your Honor please.

The COURT.—I will not permit either side to ask the witness leading questions. His relations to both sides are such that I think he should not be lead.

Mr. SWAN.—An exception.

Mr. SWAN.—I think that is all.

Redirect Examination.

(By Mr. ELDER.)

Q. Mr. Younkin, did you have any instructions

(Testimony of Harry Younkin.)

from the superintendent or the man over you in this company, regarding the distance which you should go when this machine was skidding logs?

A. No, sir, when I ordered cable for the machine, they sent up five hundred feet, if I remember right.

Q. Did you have any instructions when you was skidding logs with the regular skidding machine regarding leaving logs at any distance from the track when skidding with this machine?

Mr. SWAN.—Just a moment. This man states that he never operated a skidding machine here, that he operated nothing but this loader.

The COURT.—What is the fact, Mr. Younkin?

Mr. ELDER.—Did you have a regular skidding machine there?

A. Yes, sir, I had a slide, a small donkey.

Q. Was it equipped with a haul-back and signal device. A. Yes, sir.

Q. Could that machine have been used in bringing in this timber on this sidehill by putting out your lines there?

A. I presume it could, yes; that is, there was timber there all around it. [76]

Q. This timber on this sidehill wasn't a scattering log here and there, was it? Wasn't it pretty heavily timbered?

The COURT.—Ask him how the logs lay there on that hill.

A. Well, there was a piece of ground there,—I don't just remember,—I don't know how much timber was on this sidehill.

(Testimony of Harry Younkin.)

The COURT.—By timber, do you mean logs?

A. Yes, timber that was felled and made into logs there; there had never been no other logs taken away. In some places it was pretty thick, and in some places not so thick.

Q. Did you have any instructions regarding how much of that timber should be hauled in with the Marion loader, from your company?

A. No, sir; I was supposed to use my own judgment in that.

Q. You said that you would take the haul-back line out and bring in a log if you only had one or two. I wish you would explain to the jury what you meant by that.

A. It is just that if you had a donkey sitting here, and you cleaned up, with your donkey sitting there, and you only had one or two logs laying around back here, you would catch them with your haul-back line, if your haul-back line was sufficient to pull them in, and the logs were so you could.

Q. Why would you do that?

A. Because you wouldn't want to pull your haul-back line out and bring it around for one or two or three logs.

Q. Why wouldn't you take your main line?

A. Because the main line on a donkey is too heavy to pull out.

The COURT.—That is, you mean it is too heavy to pull out by hand?

A. Yes, an inch and an inch and an eighth and an inch and a quarter cable.

(Testimony of Harry Younkin.)

Mr. ELDER.—That is all.

Recross-examination. [77]

(By Mr. SWAN.)

Q. Would you pull the haul-back out by hand just the same as you would pull the cable out on the Marion loader?

A. Certainly, you would have no other way.

Q. You said you were supposed to use your own judgment in these matters? A. Yes, sir.

Q. And you did use your own judgment in these matters? A. Yes, sir.

Q. And your best judgment?

A. Yes, sir, to the best of my knowledge.

Q. Where was this slide machine you speak of, that morning?

A. The slide was just below where the jammer was skidding.

Q. Did you have it there at the camp with you?

A. The slide?

Q. Yes.

A. No, sir, it was sitting off at the lower side of the creek, off the cars; the slide works on the ground.

Q. Was it right there?

A. No, sir, it wasn't right there.

Q. How far away was it from where you were operating the Marion loader at the time?

A. I don't know just how far it was; it probably was a thousand or fifteen hundred feet down the track, off on the opposite of the track, getting timber from the other side.

(Testimony of Harry Younkin.)

Q. You could have used that if you had thought it advisable?

A. I could have used that if I had had it up there.

Q. That morning? A. Yes, sir.

Q. And you didn't think the use of the Marion loader was any more dangerous under the circumstances than if you had used the slide? [78]

Mr. ELDER.—I object to that.

The COURT.—That is leading.

Mr. SWAN.—I thought I could go quite a little ways on cross-examination of the witness.

The COURT.—It depends on the relation of the witness to the parties.

Mr. SWAN.—Exception; I believe that is all.

Mr. ELDER.—That is all. [79]

[Testimony of Thompson R. Manning, for Plaintiff.]

THOMPSON R. MANNING, a witness duly called and sworn on behalf of the plaintiff, testified as follows, on

Direct Examination.

(By Mr. ELDER.)

Q. State your name to the reporter.

A. Thompson R. Manning.

Q. Where do you reside?

A. I reside at Coeur d'Alene at present.

Q. What is your occupation? A. Engineer.

Q. Did you ever have any experience with running what is known as a donkey-engine, or a skidding machine, where a haul-back line and whistle device are used on the machine? A. I have.

Q. How many year's experience?

(Testimony of Thompson R. Manning.)

what would happen, isn't it?

A. Yes, but if the dogs are driven into the log you can hold your log or break your tackle.

Q. You have to drive it into the rear end of the log?

A. No; as a general thing you use what you call a dog, and it is driven from the front end of the log.

Q. Then it resolves itself into a proposition of how the line is fastened into the log?

A. Yes, sir, that is it.

Mr. SWAN.—That is all.

Mr. ELDER.—That is all. [82]

[Testimony of George Westfall, for Plaintiff.]

GEORGE WESTFALL, a witness duly called and sworn on behalf of the plaintiff, testified as follows, on

Direct Examination.

(By Mr. ELDER.)

Q. You may state your name.

A. George Westfall.

Q. Where do you reside, Mr. Westfall?

A. I have been at Bovill for the last two weeks.

Q. What is your employment, what is your occupation?

A. Well, I generally hook tongs or run a Marion. That is what I have followed for the last eight years.

Q. Where have you run the Marion? Where have you had experience with the Marion steam loader?

A. I run it for the Potlatch Lumber Company, and I run it for the I. W. N.

(Testimony of George Westfall.)

Q. Where else have you had experience with the Marion loader?

A. I never had any only with those two places.

Q. Did you ever work around where they were used?

A. In only those two places. I have other machines though, the Barnhart.

Q. Have you worked with machines of the same type as the Marion steam loader at other places?

A. The Model Ten is all.

Q. Is it of the same character and general type as the Marion steam loader? A. Yes, sir.

Q. Where you have worked with that?

A. I have worked for the Laurel River Lumber Co.

Q. Where else?

A. Lynchville, at Lynchville, West Virginia. I worked in Burner, West Virginia, for the Burner Lumber Co. [83]

Q. Any other place? A. No, sir, that is all.

Q. In your eight years' experience, Mr. Westfall, do you know, or can you state, whether or not the steam loader is generally used by logging companies for the purpose of skidding logs?

Mr. SWAN.—I object to that upon the ground that he hasn't shown himself qualified, and on the further ground that the question is objectionable unless counsel embodies in it all the facts and circumstances that existed at the time of this accident.

The COURT.—Overruled.

Mr. SWAN.—An exception.

(Testimony of George Westfall.)

Mr. ELDER.—Read the question.

(Last question read.)

A. No, sir, only the Potlatch.

Q. Only the Potlatch company, did you say?

A. That is the only place I ever skidded with them or worked around them where they were skidded.

Q. Will you state, Mr. Westfall, from your experience and knowledge of the general operation of the Marion steam loaders by different logging companies whether or not they generally have a limit on which they will go for logs for the purpose of loading.

Mr. SWAN.—That is objected to, as incompetent, irrelevant and immaterial.

Q. From the track or machine?

The COURT.—Overruled.

Mr. SWAN.—An exception.

The COURT.—Answer the question.

A. Yes, sir.

Mr. ELDER.—How far?

A. Seventy-five feet.

Mr. ELDER.—That is all. [84]

Cross-examination.

(By Mr. SWAN.)

Q. They do haul in logs quite frequently at the various places you have worked a distance of seventy-five feet? A. Sir?

Mr. SWAN.—Read the question.

(Last question read.)

A. Yes, sir.

Q. They do that by the Marion steam loader, with the Marion steam loader? A. Yes, sir.

(Testimony of George Westfall.)

Q. They do it with other loaders of a similar nature? A. Sir?

Q. They do it with other loaders of a similar nature? A. Yes, sir.

Q. What length of cable is generally used on those machines that you are familiar with?

A. One hundred to one hundred and twenty-five feet.

Q. And it wouldn't be practicable with a cable of that length to go out much farther than seventy-five feet, would it? A. No, not in one way.

Q. Now, how long have you worked down there at the Potlatch Lumber Company?

A. I started to work for them, to the best of my knowledge, in November, two years ago.

Q. Operated a Marion loader during that time, have you? A. No, I hooked tongs at first.

Q. On a loader? A. Yes.

Q. Did you hook tongs or run a loader when you were in the employ of the other company?

A. What other company?

Q. Well, the other companies you have had experience with? [85] A. Yes, sir.

Q. Did you do both? A. Yes, sir.

Q. Have you ever skidded logs with other loaders than the Marion? A. No, sir.

Q. You never saw any of the others in operation?

A. I have seen them in operation; I never seen them skid.

Q. Well, where did you see the Marion skid?

A. Potlatch.

(Testimony of George Westfall.)

Q. Where else? A. That is all.

Q. Well, I thought you told me that the places you had worked, the distance they skidded logs was seventy-five feet?

A. They didn't skid them. They were decked logs, decked up high, eight or ten high.

Q. Eight or ten high?

A. Yes, eight or ten logs high, keep rolling them down to the track and loading them. You might call it skidding, if you want to, but they were decked logs; they weren't going out in the brush after them.

Q. Then, as a matter of fact, these machines up here when you worked with them, wasn't being used for skidding logs at all, was they? A. Sir?

Q. This machine wasn't being used for skidding logs at all, was it?

The COURT.—Where, Mr. Swan?

Mr. SWAN.—At the time you mentioned, the other machine. The other machine you worked with.

The COURT.—I don't think I quite understand.

Mr. ELDER.—I submit to your Honor that is what he stated.

Mr. SWAN.—I want to know—he says here that he had a [86] certain rule or custom, and that they only run out seventy-five feet in skidding logs where he used to work, and now he says he didn't skid there at all.

The COURT.—Loading logs, not skidding. He was asked whether there was a limit beyond which they would not go in loading logs, and he said “yes seventy-five feet.”

(Testimony of George Westfall.)

Mr. SWAN.—How long did you work on the loader up there? A. At Potlatch?

Q. No, at Spirit Lake?

A. I started to work there in March, and I worked off and on all summer, for definite periods.

Q. What?

A. Periods I worked there. The last month I was there, I run a machine there, a loader, a Marion.

Q. When these logs were laying around there at the loading station, if they were off a distance of seventy-five feet, then you would run that cable out, that Marion loader, and pull them in, is that what you mean as to the way the work was being done up there? A. At Spirit Lake?

Q. Yes? A. Pulling them in?

Q. Yes. A. We didn't pull any in; we loaded.

Q. You loaded from where they were decked?

A. Yes.

Q. That is the only experience you had up there?

A. Yes, sir.

Q. Just loading?

A. Loading and hooking both.

Q. Where did you hook?

A. Hooked in the line on the skidways. [87]

Q. That was in this same operation of loading?

A. Yes.

Q. And that is what your experience was confined to up there? A. Yes.

Mr. SWAN.—That is all.

Mr. ELDER.—That is all. [88]

[Testimony of Charles Young, for Plaintiff.]

CHARLES YOUNG, a witness duly called and sworn on behalf of the plaintiff, testified as follows, on

Direct Examination.

(By Mr. ELDER.)

Q. State your name. A. Charles Young.

Q. Where do you reside?

A. Near Liberty Lake.

Q. What is your occupation, Mr. Young?

A. Engineer.

Q. Have you ever had any experience with Marion steam loaders or loaders of that class or general design? A. Yes, sir.

Q. What experience have you had?

A. Oh, about eight or nine years, working, running and working around the machine.

Q. Where, Mr. Young, and for what companies?

A. Well, for the Dry Fork Lumber Company and Lynville, West Virginia, The West Virginia Lumber Company at Castle, West Virginia, Fremont Lumber Company at Eros, Louisiana, Spirit L. Lumber Company, Michigan.

Q. Any in this section?

A. The Capital Dominion Sawmill Company in Canada, the Idaho and Washington-Northern Railroad Company at Spirit Lake.

Q. You may state from your knowledge and experience whether or not logging companies generally use the Marion steam loaders or loaders of that class

(Testimony of Charles Young.)

or general design for the purpose of skidding logs.

A. No, not where I worked.

Q. Mr. Young, do you know what a haul-back line is? A. Yes, sir.

Q. Have you ever operated a machine equipped with a haul-back [89] line? A. Yes, sir.

Q. You may state, from your experience with machines of that class, Mr. Young, if a log sixteen inches at the top, 32 feet long, a tamarack log,—I don't believe that is in evidence, what kind of a log it was—was fastened to the main cable, and a haul-back line fastened on to this main cable, if that log could be held in its course by the engineer, by the use of his brake and the machinery on his drum and engine.

Mr. SWAN.—I object to that as incompetent, irrelevant and immaterial, and calling for a conclusion or opinion of the witness it does not tend to prove any facts in issue in this case.

The COURT.—Overruled.

Mr. SWAN.—An exception.

The COURT.—Answer the question, Mr. Witness.

A. Why you could hold it to a certain extent.

Mr. ELDER.—That is all.

Cross-examination.

(By Mr. SWAN.)

Q. I presume it would depend a good deal on the manner in which it was fastened? A. Sir?

Q. It would depend altogether on the manner in which the man fastened the haul-back line on to the log?

A. It wouldn't depend so much on how it was fast-

(Testimony of Charles Young.)

ened, so long as it stayed fastened.

Q. It would depend a good deal on the circumstances and conditions?

A. It wouldn't hold the log unless it stayed fastened.

Q. And whether it stayed fastened would depend altogether on the manner in which it was placed there?

A. Yes, sir.

Q. How long did you operate a machine on Spirit Lake? [90]

A. I didn't operate a Marion at Spirit Lake; I operated an American.

Q. How long did you operate that?

A. Two years and two months.

Q. Altogether? A. Yes, sir.

Q. And during that time you used it as a loading machine? A. Loading and ditching.

Q. What do you mean by ditching?

A. Used it as a ditcher in cleaning up along the right of way, holes and the like of that.

Q. Any of the time that you were loading there, did you have to pull any logs from the side of the track or a little distance away?

A. Oh, about sixty or seventy-five feet.

Q. In other words you wouldn't call that skidding though I suppose. A. No, sir.

Q. But, in other words, you would run that cable out for sixty or seventy-five feet and pull these logs in the manner described? A. Yes, sir.

Q. You would pull them in I mean?

A. Yes, you would pull them in a certain distance.

(Testimony of Charles Young.)

Q. You would run your cable out in different directions all around and pull the logs in?

A. Yes, sir.

Q. You didn't have any haul-back line, did you?

A. No, sir.

Q. Didn't have any signal-cord?

Q. The men pulled the line of themselves, didn't they? A. Yes.

Q. And fastened it into the logs and then pulled it back? [91] A. Yes.

Q. Nothing to steady the log at all? A. No, sir.

Mr. SWAN.—That is all.

Redirect Examination.

(By Mr. ELDER.)

Q. You would simply fasten on to the logs and load them, wouldn't you, at that time?

A. Yes, sir.

Q. How would they fasten the cable on to the log?

A. With tongs.

Q. How many tongs? A. One.

Q. Where would you fasten it?

A. A long log you would fasten it close to the end, and a short log, you would fasten it in the middle or close to the middle.

Q. In those operations everybody is really in sight of the engineer, aren't they, all the time?

A. Yes, sir.

Q. In sight of one another? A. Yes, sir.

Q. And the loader is a lifting load, and not a pulling, isn't it?

Mr. SWAN.—I object to that; it is leading.

(Testimony of Charles Young.)

The COURT.—It is leading.

Mr. SWAN.—He has explained just how it is done.

Mr. ELDER.—I suppose it is leading. I was simply trying to get at the facts.

Q. You may state how a loader of this design and class is handled and how you load the logs.

Mr. SWAN.—I object, if the Court please, to that. It is immaterial. They weren't using it at the time, and I don't think [92] it makes any difference.

The COURT.—What you are trying to get at is whether a log is lifted or dragged?

Mr. ELDER.—Yes.

The COURT.—You may ask him whether it is dragged from any distance.

Mr. ELDER.—When you are loading from one of these machines, do you lift or drag the log?

A. You drag it until it gets within a certain distance of the boom, and then you lift it.

Mr. ELDER.—That is all.

Recross-examination.

(By Mr. SWAN.)

Q. You do that whether it is dragged a few feet or a great distance?

A. The boom sweeps out about fifteen or eighteen feet.

Q. The manner of dragging it along the ground would be just the same though?

The COURT.—Just the same as what?

Mr. SWAN.—Whether you pulled it in twenty feet, or whether you pulled it in seventy-five feet, you dragged it to the end of the crane, is what I wanted to

(Testimony of Charles Young.)

get at. A, Yes, sir.

Q. You drag it along the ground to the end of the crane and then raise it? A. Yes, sir.

Mr. SWAN.—That is all.

The COURT.—Gentlemen of the jury, there are some of you here who were not here yesterday evening, and I caution you not to discuss this case, or to permit anybody to discuss it with you or in your presence until the case is finally submitted to you. You may return at two o'clock. [93]

Accordingly, an adjournment was taken until two P. M.

At two P. M. the Court resumed its session, pursuant to adjournment, and the following proceedings were had, to wit:

[Testimony of Joe Cherry, for Plaintiff.]

JOE CHERRY, a witness duly called and sworn on behalf of the plaintiff, testified as follows, on

Direct Examination.

(By Mr. ELDER.)

Q. State your name, Mr. Cherry.

A. Joe Cherry.

Q. What is your occupation? A. Woodsman.

Q. Have you ever had any experience with Marion steam loaders? A. Yes, sir.

Q. And with other loaders of that class?

A. Yes, sir.

Q. And general character? A. Yes, sir.

Q. Where?

A. In Arizona and New Mexico, and in the vicinity here.

(Testimony of Joe Cherry.)

Q. Ever work for any other company than this—are you in the employ of the Potlatch Lumber Company now? A. Yes, sir.

Q. Did you ever work for any other company in this section? A. Yes, sir.

Q. That used steam loaders? A. Yes, sir.

Q. How many years' experience have you had in working around steam loaders, Mr. Cherry?

A. Eight or ten.

Q. You may state, from your knowledge and observation, if [94] Marion steam loaders—were Marion steam loaders generally or commonly used by logging companies for the purpose of skidding logs.

Mr. SWAN.—I object to that as incompetent, irrelevant and immaterial, and on the further ground that the witness has not shown himself qualified to answer the question.

The COURT.—Overruled.

Mr. SWAN.—An exception.

Mr. ELDER.—You may answer.

A. Well, I have never seen them used for that purpose. Wherever I worked with these machines they had a limit, that was seventy-five feet from the loader, and outside of that, I have went outside of that only for this company, the Potlatch company.

Mr. ELDER.—Take the witness.

Cross-examination.

(By Mr. SWAN.)

Q. Where were you employed when you operated one, other than the Potlatch Lumber Company?

(Testimony of Joe Cherry.)

A. With the Arizona Lumber Company at Flagstaff, Arizona.

Q. Arizona Lumber Company? A. Yes, sir.

Q. Was that a Marion loader?

A. It was a Marion Model Ten.

Q. Is that used right alongside of the track where the cars are loaded? A. Yes, sir.

Q. That is the only place it was used?

Q. Isn't it true, in the place where you were loading those logs, the logs were loaded, or, rather, brought in and collected and piled alongside of the track by contract? A. By the company.

Q. By the contractor?

A. By the company. [95]

Q. By the company? A. Yes, sir.

Q. By what company?

A. By the Arizona Lumber Company.

Q. The Arizona Lumber Company?

A. Yes, sir.

Q. And in all those cases, though the logs were piled right up alongside of the track?

A. Yes, sir.

Q. Some distance away from the woods?

A. The steel was laid right into the timber.

Q. Then they would pull these logs right up alongside of the track and all you had to do was to load them? A. Yes, sir.

Q. How much of a cable did you have on the loader? A. One hundred and twenty-five feet.

Q. One hundred and twenty-five feet?

A. Yes, sir.

(Testimony of Joe Cherry.)

latch Lumber Company? A. A year last June.

Q. How? A. I came there a year ago last June.

Q. Have you operated a Marion loader during that time? A. Not altogether.

Q. Well, any portion of the time?

A. About three months and a half, I believe, I was on the loader.

Q. What did you do there?

A. I loaded and skidded.

Q. Loaded and skidded? A. Yes, sir.

Q. And how far out did you skid there? [98]

A. Three hundred and fifty or four hundred feet.

Q. Three hundred and fifty to four hundred feet?

A. Yes.

Q. That would be in connection with the loading of the cars, wouldn't it?

A. No, sir; they would skid enough for a load and then load it.

Q. Some logs there, I presume, would be piled up close to the track, and others would be scattered all around it? A. Yes, sir.

Q. And then you would run a line out in every direction and bring in those logs wherever they happened to be lying? A. Yes, sir.

Q. During what months was that? It was during the last year and a half, you say? A. Yes, sir.

Q. And it was customary there to do that right along, wasn't it?

A. I don't know about right along. There was a time last spring early that we didn't have to skid any.

(Testimony of Joe Cherry.)

We loaded right along the track.

Q. It would all depend on where the logs happened to be though, wouldn't it, Mr. Cherry? A. Yes.

Mr. SWAN.—I think that is all.

Mr. ELDER.—That is all. [99]

[Testimony of Ray Payzant, for Plaintiff.]

RAY PAYZANT, a witness duly called and sworn on behalf of the plaintiff, testified as follows, on

Direct Examination.

(By Mr. ELDER.)

Q. You may state your name.

A. Ray Payzant.

Q. Where do you reside?

A. At Bovill.

Q. What is your occupation?

A. I am a donkey-engineer, what they call a donkey-man.

Q. How much experience have you had in running machines equipped with haul-back lines, such as a donkey or slide?

A. About eleven years, I should think, off and on.

Q. How many different companies have you worked for?

A. I couldn't say positively,—possibly a dozen or fourteen different companies, something of that kind.

Q. From your observation and knowledge, Mr. Payzant, you may state to the jury whether or not machines which are generally used by companies for skidding purposes are equipped with a haul-back line.

(Testimony of Ray Payzant.)

Mr. SWAN.—That is objected to as incompetent, irrelevant and immaterial, and for the reason that this witness has not shown himself qualified to answer that question, and it does not tend to prove any facts in issue in this case.

The COURT.—Overruled.

Mr. SWAN.—An exception.

The COURT.—Answer the question.

A. Yes, they are.

Mr. ELDER.—Q. Now, you may state, Mr. Payzant, if you were skidding with a machine equipped with a haul-back line and were going out say a distance of five hundred feet on a grade of ten per cent or a little more, your main line is hooked on to a log 32 feet long and 16 inches at the top, and your haul-back line is fastened to your main cable, could you, if the [100] machine is equipped as they are usually and generally equipped for skidding purposes, keep that log in its course?

Mr. SWAN.—That is objected to as incompetent, irrelevant, and immaterial, and calling for a conclusion of the witness, and it does not state any facts in issue in this case.

The COURT.—Overruled.

Mr. SWAN.—An exception.

A. Why, I could help to keep it in its course; I won't positively say I could keep it in a straight course.

Q. How would you do that?

Mr. SWAN.—The same objection.

(Testimony of Ray Payzant.)

The COURT.—Overruled.

Mr. SWAN.—An exception.

A. Why, by keeping the tension on my brakes and keeping the line tight.

Q. On which line? A. The haul-back.

Mr. ELDER.—You may take the witness.

Cross-examination.

(By Mr. SWAN.)

Q. How long have you run a donkey-engine?

A. Ten or eleven years, I think.

Q. You haven't operated any other kind of machines used in the woods excepting a donkey-engine?

A. That is all.

Q. That is the only kind you have operated.

A. Yes, sir.

Q. Now, as a matter of fact, the skidding that you have done with the donkey-engine has been out along distance in the woods, has it not?

A. No, not altogether.

Q. Well, how far out have you skidded with a donkey-engine?

A. I have skidded three thousand feet, perhaps.

[101]

Q. And most of the time the work has required you to go out that far, has it?

A. Yes,—not that far, but from that to one thousand feet.

Q. From one thousand feet out to three thousand feet is about the way you have always skidded with your donkey-engine? A. Most of the time.

(Testimony of Ray Payzant.)

Q. And, as a matter of fact, you would always in those cases have a haul-back line clear around for the purpose of carrying out the cable, after you had pulled in the logs? A. Yes, sir.

Q. And you just pulled the cable right back out to the woods where the men wanted to use it again?

A. Yes, sir.

Q. And when you would rig that up I presume you would keep the line there in operation in that one position for at least several days at a time?

A. On that distance out; yes.

Q. Did you ever rig it up that you know of for fifteen minutes' work? A. No.

Q. What did you say? A. No, sir.

Q. Or an hour's work? A. Yes, I think so.

Q. You have done it for an hour's work?

A. Yes, sir.

Q. That is, if you had enough logs in that one particular path to keep you busy for an hour you would probably run a haul-back line out, is that the idea? A. I wouldn't; the rigging crew would.

Q. I say you would have that run out?

A. Yes, sir. [102]

Q. But if it was only for a short time or a few logs, out there, you wouldn't run it out, you wouldn't equip it with a haul-back line, would you?

A. I would either have to do that or leave them.

Q. You would either have to do that or leave them if they were away up? A. Yes.

Q. Now, when you have this line running clear out

(Testimony of Ray Payzant.)

and you pull the logs in there, you have what you call a sort of a skidway for pulling the logs along one certain path, don't you?

A. No, a skid road you call it.

Q. A skid road? A. Yes, sir.

Q. They always pull right along that same path or road? A. Yes, sir.

Q. Now, supposing you had some logs lying off here to one side, forty, or fifty, or sixty, or a hundred feet on each side of this main line, how do you get those in?

A. Yard them in with a yarding line, a short line coupled on.

Q. Is that what you call a choker?

A. No, sir; some places it is called a yarder or tag line.

Q. Is that operated by your machine just the same? A. Yes, sir.

Q. You run those down the side lines as far as necessary to pull the logs in?

A. Forty or fifty feet, perhaps.

Q. Whatever distance you can run it out to get the logs, isn't that true? A. Yes, sir.

Q. You don't rig up a haul-back for that, do you?

A. No, sir.

Q. You just pull those in without anything to steady them?

A. Pull them into the skid road? [103]

Q. Yes. A. Yes, sir.

Q. And then on down to the donkey-engine or loading place? A. Yes.

(Testimony of Ray Payzant.)

Q. That is all you do,—you don't do anything else?

A. I do everything in connection with that donkey.

Q. What I mean is, Mr. Payzant, you don't make any particular preparation or equipment, use any particular equipment for running these side lines out and pulling the logs in? A. No.

Q. When you pull those in, do you continue right on down with that log to the loading place?

A. No, sir; we pull them out to the road, then the tag line is taken off, and picked up and coupled up to the chokers.

Mr. SWAN.—That is all.

Redirect Examination.

(By Mr. ELDER.)

Q. Do the companies ever run a line out, say not more than five hundred feet, for a haul-back line, for logs say five hundred feet?

A. Yes, with a slide, not this particular kind of donkey that we have just been describing.

Q. What is the difference between this and a slide?

A. A slide is called a slide because it is made to run on the top of the cars, always left on top of the cars, even while we are skidding.

Q. Does it have two drums? A. Yes, sir.

Q. Signal wire, connected with it, signal cord?

Mr. SWAN.—That is objected to as immaterial.

The COURT.—Overruled.

Mr. SWAN.—An exception. [104]

(Testimony of Ray Payzant.)

A. Yes, sir, it has, as far as I have seen, it has a signal wire.

Q. In fact, one is just a little larger than the other, isn't that about the difference?

A. No, they are different built machines somewhat.

Q. Just explain to the jury so that they will understand what the difference is, Mr. Payzant?

A. They are a light built machine, just a purpose for this kind of work, although sometimes—

Q. For what kind of work?

A. For this skidding, and the slides have a boom on the front end of the sled, and another donkey don't use any boom on the sled.

Q. You mean a swinging—

A. It don't swing,—a stationary boom.

Q. What is that used for?

A. It is used so that they can load their logs as they skid them in.

Q. Then with a slide machine, they load the logs too? A. Yes, sir.

Q. And are those machines equipped with haul-back lines?

Mr. SWAN.—This is objected to as immaterial.
The COURT.—Overruled.

Mr. SWAN.—An exception.

A. Yes, sir, they are.

Mr. ELDER.—That is all.

Recross-examination.

(By Mr. SWAN.)

Q. Did you ever operate one of those skids?

(Testimony of Ray Payzant.)

A. Just once. I haven't operated any in this particular part of the country.

Q. You haven't operated any in this part of the country? A. No, sir.

Q. You don't know how these slides in this part of the country are equipped, do you? [105]

A. I do.

Q. You say you do. A. Yes, sir.

Q. Where did you see them?

A. I saw what the Potlatch Lumber Company has.

Q. Did you ever use one down there?

A. No, sir.

Q. Do they have one right where you were working?

A. They have had several where I have been working.

Q. And they use those much the same as they do a donkey?

A. No, sir, they do not,—something the same.

Q. Well, in what respect does it differ from the donkey?

A. They use them for short skidding and loading along the railroad.

Q. How short?

A. Well, perhaps five hundred feet.

Q. Well, do they use them any further out?

A. They may; I am not aware if they do.

Q. You never saw them use them any further out than five hundred feet? A. No, sir.

Q. And the slide, of course, has to be used right

(Testimony of Ray Payzant.)

along the railroad, doesn't it?

A. Yes,—well, I won't say it has to be used, but they do use them along the railroad. They leave them on top of the cars.

Q. Did you ever see them operate a Marion?

A. Yes, sir.

Q. How? A. Yes, sir.

Q. Whereabouts?

A. I have seen the Potlatch Lumber Company people [106] operate their Marion.

Q. Anywhere else? A. I think not.

Q. You don't know of any other place?

A. I have seen Marion loaders other places, but I think I never seen them in operation.

Q. So far as you know they are in general use, are they not?

A. I couldn't say, I am sure; I have seen very few of them.

Q. Now, the Marion loaders down there, how many have you seen down there at the Potlatch Lumber Company? A. Two.

Q. They operate those quite extensively, don't they? A. Yes, sir.

Q. As a matter of fact, the operation of the Marion loader is very similar to that of the slide, isn't it? A. No, it is not.

Q. It is not the same? A. No, sir.

Q. In what respect do they differ?

A. Why, the slides are used more for short skidding purposes, I think. The Marions, as much as I have been watching them, are for loading big logs;

(Testimony of Ray Payzant.)

they may be doing other things, but that is all I have observed.

Q. The slide then is rigged up about the same for short distances as the donkey is for long distances?

A. Something the same, only the slides sit on the cars and do their own loading, and the donkey sits on the ground and they have a separate boom.

Q. They can load with a donkey-engine, though?
[107] A. Oh, yes.

Q. Any one of those machines can be used for either skidding or loading, if the opportunity or occasion requires, can they not?

A. They can all be used for skidding for their respective distances.

Q. And also for loading? A. Yes, sir.

Q. Now, you said something about you thought you might be able to control to some extent the log or logs in pulling in from the woods with a haul-back line, what do you mean by that?

A. You will have to ask the gentlemen what he meant by the question. I answered his question.

Q. You said you could control it to some extent. I want to know to what extent and in what manner you intended to infer that you could control the log?

A. If you want to stop, you can stop your rigging any place, while otherwise, coming down the hill or something, and you have got no way of stopping your rigging, and the log might carry it on down the hill.

Q. The haul-back is fastened to the cable, isn't it, that pulls in the log? A. It is.

(Testimony of Ray Payzant.)

Q. And it has no control whatever over the log itself?

A. The haul-back is fastened to the cable that is fastened on to the log?

Q. At the front end like this, and say this is the log here and the cable is fastened up at this end, pulling it this way? A. Yes, sir.

Q. Now, your haul-back comes around this way, and is fastened to the rigging? A. Exactly.

Q. It doesn't in any way control the log behind it? [108]

A. It controls it to this extent, it has a tendency to be pulling it in all the time when the haul-back is properly put out,—if this line is properly put out it is—if a log is out here somewhere, it will hug this curve because there is a little tension on the haul-back all the time.

Q. Now, supposing when you are pulling that log in, Mr. Payzant, that the log starts to roll off like that, what is going to prevent it from swinging around in that way?

A. There is nothing can prevent the big end swinging around; it might swing clear around there, if you stop it, it might.

Q. Then, as a matter of fact, you can't control the swinging of the log, the only thing you can do with the haul-back line, if you use the brake and stop the rigging, is to hold the rigging back; isn't that true?

A. Yes, sir.

Q. Wouldn't that very fact there have a tendency to cause that log to swing around down the hill?

(Testimony of Ray Payzant.)

A. Not where there is a road, not where there has been logs made two or three trips over the road once.

Q. Supposing you didn't have any road there, supposing this was a place there where you was just pulling in a few stray logs, wouldn't it have a tendency, when you jerked on that rigging, to throw the log around that way? A. I don't know.

Q. Supposing that the rigging wasn't fastened securely to the log and the log broke loose, you couldn't control the movements of the log at all under those circumstances, could you?

A. Not when it is loose.

Q. Then the question of whether or not you could control to any extent whatever the movements of that log would depend upon the manner with which the rigging was fastened to the log and whether or not it held? [109] A. I don't understand you.

Q. I say, the question of whether you could control the movements of that log to any extent whatever would depend upon the manner in which the rigging was fastened into the log and whether or not it held.

A. Well, if the rigging holds you can stop the log anywhere, the front end of it.

Q. I understand that.

A. But the hind end of it, I wouldn't say.

Q. You couldn't control the rear end of it at all, or any part except the front end of it? A. No.

Q. Then, as I say, the controlling of it to any extent at all would depend upon the manner in which the rigging was fastened on to the log and whether or not the rigging held on to the log; isn't that true?

(Testimony of Ray Payzant.)

A. Yes, sir.

Mr. SWAN.—I think that is all.

Redirect Examination.

(By Mr. ELDER.)

Q. How are the logs fastened on to those cables?

Mr. SWAN.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—Overruled.

Mr. SWAN.—An exception.

A. By a short piece of cable that we call a choker.

Q. How is it fastened on to the log?

A. It is hooked around and then hooked on to the main cable.

Mr. ELDER.—I believe that is all.

Mr. SWAN.—That is all.

Mr. ELDER.—We want to recall Mr. YOUNKIN for one question. [110]

**[Testimony of Harry YOUNKIN, for Plaintiff
(Recalled).]**

HARRY YOUNKIN, a witness heretofore duly called and sworn on behalf of the plaintiff, upon being recalled, testified as follows, on

Direct Examination.

(By Mr. ELDER.)

Q. Mr. YOUNKIN, how far was this tree which was knocked over on to Mr. Harkins from the line between the skidding machine and the place where they hooked on to this log?

Mr. SWAN.—I object to that, if the Court please, on the ground that this man stated that he wasn't

(Testimony of Harry Younkin.)

there and didn't know anything about it.

The COURT.—Sustained.

Mr. ELDER.—Mr. Younkin, do you know where the machine stood at that time? A. Yes, sir.

Q. Do you know where the log was that they hooked on to?

Mr. SWAN.—He said he didn't; if the Court please, I don't see how he can answer the question.

Mr. ELDER.—He said he wasn't there.

Mr. SWAN.—Certainly if he wasn't there, he couldn't tell.

The COURT.—He may answer whether or not he did know.

A. Well, sir, all I know is what they told me afterwards.

Mr. SWAN.—That is enough.

Mr. ELDER.—Q. You don't know then of your own personal knowledge where the log was?

A. No, sir.

Mr. ELDER.—That is all.

Mr. SWAN.—That is all. [111]

[Testimony of Mrs. Susan Harkins, for Plaintiff.]

Mrs. SUSAN HARKINS, a witness duly called and sworn on behalf of the plaintiff, testified as follows, on

Direct Examination.

(By Mr. ELDER.)

Q. State your name.

Mr. SWAN.—It might shorten this case up a little by stating that the defendant admits that this witness

(Testimony of Mrs. Susan Harkins.)

was the wife of Mr. Harkins and is now the widow of Mr. Harkins, that he was killed at the time and place mentioned in the complaint, and that he was a kind and loving husband, as alleged in the complaint, and that he was of the age also alleged.

Mr. ELDER.—Q. How long had you been married? A. We were married in 1900.

Q. What was your husband's occupation?

A. Usually a millman by occupation.

Q. What had he engaged in?

A. He used to be in business for himself, was running a mill and then of later years he was a filer of hand-saws, and at one time, at different times, he was a scaler.

Q. What did he usually earn?

A. Filing hand-saws he got six and six and a half a day. For one company he got seven dollars for a period of three months.

Q. What did he usually and generally make per day?

Mr. SWAN.—I don't think counsel ought to be allowed to go over a wide range in this matter, if the Court please, and I think the line of questions should be confined to at least a year or two prior to his death.

The COURT.—Well, I think it may be confined to the period after the marriage of the witness to the deceased.

Mr. ELDER.—Q. All you have testified to has been employments he has engaged in since you were married?

A. Yes, sir, at the time we were married, he was

(Testimony of Mrs. Susan Harkins.)

the [112] owner of a sawmill.

Mr. ELDER.—I believe it is admitted that he was earning three dollars and fifty cents a day at the work he was engaged in?

Mr. SWAN.—I thought you alleged two dollars and fifty cents.

Mr. ELDER.—Three dollars and fifty cents.

Mr. SWAN.—Just a moment.

The COURT.—The complaint says two dollars and fifty cents.

Mr. SWAN.—I wouldn't want to admit that then. You might prove that.

The COURT.—You admit that expressly in your answer.

Mr. SWAN.—All right.

Mr. ELDER.—Q. Mrs. Harkins, did Mr. Harkins furnish you any part of his earnings for your support?

A. Yes, sir; our bank account was kept jointly; it was for both.

Q. What did he do with his money when he earned it?

A. Usually brought it home and put it in the bank after the bills were paid.

Q. And you were allowed to check on the account, were you? A. Yes, sir.

Q. Do you know what your husband usually or generally earned per month, or about what he was earning?

Mr. SWAN.—I think, if your Honor please, that what he did and actually earned at different times

(Testimony of Mrs. Susan Harkins.)

might be admissible, but I don't think counsel could say what he was accustomed to earn over any given period, that is, the average; I think he would have to be specific in the proof.

The COURT.—Yes, I think so.

Mr. ELDER.—Q. You may state, in the last few years before your husband's death, what he earned?

The COURT.—Do you mean per day, per month or what? [113]

Mr. ELDER.—Q. Per month?

A. Well, it was according to the work he was doing. If he was scaling or working in the woods he got about three dollars and fifty cents, or three dollars and seventy-five cents per day.

Q. What did he get when he was scaling?

A. Three dollars and seventy-five cents, I believe, is what he got.

Q. How much of his time, if you know, was he engaged in that work? A. I don't remember.

Q. Did he do any other work than scaling, if you know, scaling and woods work? A. In the woods?

Q. Yes.

A. I couldn't say; I believe he fired at one time a little while at Spirit Lake for the company when he first came there.

Q. Do you know how much a day or month he got there?

A. I don't know exactly what he got; I couldn't say, sir.

Q. Was your husband an able-bodied man?

A. Yes, sir.

(Testimony of Mrs. Susan Harkins.)

Q. He wasn't suffering from any afflictions of any kind? A. No, sir, he was well.

Mr. ELDER.—I believe that is all.

Cross-examination.

(By Mr. SWAN.)

Q. Do you know about how long he was employed as a scaler, Mrs. Harkins?

A. I couldn't say just how long.

Q. Two or three years? [114]

A. Not just at one time.

Q. But altogether he had probably had that much experience? A. I would say about two years.

Q. About two years as a scaler?

A. I couldn't say definitely.

Q. I presume that work required him to be in the woods a good deal? A. On the cars a good deal.

Q. He also worked in the woods more or less?

A. Not in the woods so much,—around the mills more.

Q. Around the woods? A. Yes.

Q. But he was obliged in his work to be in the woods more or less. I think you made the remark that he was a woodsman.

A. Well, that is, following the lumber business.

Q. He had been following the logging business for quite a long time, had he not?

A. Yes, and for himself.

Q. And since that time?

A. When he was scaling, you see, he scaled off of the cars they were loading; he didn't have to go into the woods for that purpose.

(Testimony of Mrs. Susan Harkins.)

Q. But prior to that time he had been in business for himself and he was a woodsman then?

A. I don't know that you would call it much of a woodsman. He didn't do the work in the woods himself; he had men working for him.

Q. You say he fired for a time at Spirit Lake. You mean he was fireman for one of the machines?

A. Fired on a loader for a time.

Q. What kind of a loader was that? [115]

A. Marion loader.

Q. How long did he fire on the Marion loader?

A. A short period; I couldn't say just how long,—about three months, something like that.

Q. About three months, and then he went to work for the Potlatch Lumber Company in June, 1911?

A. No, he didn't begin in June.

Q. July?

A. It must have been the latter part of July; I couldn't just say whether it was the latter part of July or in August.

Q. From that time on he worked for Mr. Younkin down in the woods around Bovill? A. Yes, sir.

Mr. SWAN.—That is all.

Mr. ELDER.—That is all, Mrs. Harkins.

That is our case.

Mr. SWAN.—If the Court please, I desire to move the Court to dismiss the action of the plaintiff for the reason and upon the ground that the plaintiff has wholly failed to show any negligence on the part of the defendant which resulted in the death of Mr. Harkins, and upon the further ground that the evi-

dence shows conclusively that all the risks and dangers incident to the use of a Marion steam loader in the manner in which it was being operated at the time of the accident was well known to Mr. Harkins, and assumed by him. That the negligence, if any, which resulted in the death of Mr. Harkins, was the negligence of a fellow-servant.

The COURT.—The motion is denied.

Mr. SWAN.—An exception.

The COURT.—Gentlemen of the jury, you may be at ease for five minutes.

A five minute recess was taken.

Mr. SWAN.—May it please the Court and gentlemen of the jury, the evidence on behalf of the defendant will be very short, [116] and I will try and be as brief as I can in my remarks, and also in putting in the testimony. It is admitted in this case that this accident to Mr. Harkins happened down there near Bovill while he was in the employ of the defendant company. We expect to show you, however, that the accident was one for which the defendant company was in no way responsible, and could not have been prevented by the exercise of ordinary care and prudence. We will endeavor to show you by witnesses and by men of experience who have been in the logging business for a great many years, that a Marion steam loader such as the one in use at this time is a reasonably safe machine, one of the best machines for that purpose, and that it is in general use all over the country, for loading, and also for skidding in logs for any distance up to five hundred

(Testimony of E. M. Rogers.)

feet. It is not practicable to have haul-back lines, and you could not do the work that way, and the machine in use here was the one in general use all over under those conditions and circumstances, and there is absolutely no negligence here for which this defendant is responsible, and having shown that, we shall ask a verdict at your hands. [117]

[Testimony of E. M. Rogers, for Defendant.]

E. M. ROGERS, a witness duly called and sworn on behalf of the defendant, testified as follows, on

Direct Examination.

(By Mr. SWAN.)

Q. State your name, please, Mr. Rogers.

A. E. M. Rogers.

Q. What is your business, Mr. Rogers?

A. General superintendent of the Blackwell Lumber Company.

Q. How long have you occupied that position?

A. I have been with this company five years this coming spring.

Q. How many years' experience have you had in woods, in the logging business? A. About thirty.

Q. In various parts of the country? A. Yes, sir.

Q. I will ask you to state whether or not you are familiar with a machine known as the Marion steam loader. A. Yes, sir.

Q. State whether or not that machine is in general use throughout the country for loading and skidding logs, for a distance of four or five hundred feet.

Mr. ELDER.—I object to that as incompetent,

(Testimony of E. M. Rogers.)

irrelevant, and immaterial, and the witness hasn't qualified himself, and for the further reason that it is double and may be answered yes and only mean that it is in use for loading purposes.

The COURT.—Overruled. Answer the question.

A. What is the question, please?

Mr. SWAN.—Read the question to him.

(Last question read.)

A. Yes, sir.

Q. You may state whether or not, Mr. Rogers, the machine [118] known as the Marion steam loader is a reasonably safe machine for that purpose.

Mr. ELDER.—I object to that as incompetent, irrelevant and immaterial, and it calls for a conclusion of this witness. That is a matter for the jury to determine, your Honor.

The COURT.—Sustained.

Mr. SWAN.—An exception.

Mr. SWAN.—Q. “Mr. Rogers, the testimony in this case tends to prove that the Potlatch Lumber Company, the defendant, was using a Marion steam loader, with a five hundred foot five-eighths cable, and that they were skidding logs, or hauling in logs from various directions a direction of between three and four hundred feet with this machine, that the log started to roll down a hill, and struck a tree, knocking it down, a dead tree, knocking it down, and killing the deceased. I will ask you to state whether or not, basing your answer upon your experience in the woods and your logging business, and your knowledge of the conditions, if that work was being

(Testimony of E. M. Rogers.)

done in a reasonably safe and customary manner.”

Mr. ELDER.—I object to that as incompetent, irrelevant and immaterial, and the witness hasn't shown himself qualified, and calling for a conclusion and opinion of this witness.

The COURT.—Sustained.

Mr. SWAN.—An exception.

Mr. SWAN.—Q. Mr. Rogers, how long have you had experience with a Marion loader, or one similar to that?

A. Ever since they have been in use in the woods.

Q. How long is that?

A. Between fifteen and twenty years.

Q. Have you had experience also with other loaders of a similar character? A. Yes, sir.

Q. Also with skidding machines? [119]

A. Yes, sir.

Q. Can you state briefly what kinds of machines you are familiar with? A. Yes, sir.

Q. I wish you would, please.

A. Acquainted with the Clyde Iron Works, the machine they call the Spreader, Barnhart, the American and the McGifford and the machines made on the coast here by the Willamette Iron Works.

Q. They are all similar in operation, are they?

A. Yes, sir.

Q. Now, Mr. Rogers, in your experience in the logging business, I wish you would state briefly the general method in use in dragging in logs from various distances out into the woods.

A. Well, according to the location and the way the

(Testimony of E. M. Rogers.)

logs are, where we have these appliances the machine we use is the loader, to drag in the logs from three to five hundred feet from the track. When you go back farther than that you use a larger machine, a heavier cable, back from twenty-five hundred to thirty-five hundred feet. With a loader from three to five hundred feet.

Q. For a distance of five hundred feet?

A. Yes, sir.

Q. That is a loader similar to the Marion?

A. Yes, sir.

Q. Or one of that character? A. Yes, sir.

Q. Those loading machines are not equipped with either a signal cord or a haul-back? A. No, sir.

Q. State whether or not it is customary in hauling in for a distance of five hundred feet, or within that radius, to use a haul-back? A. No, sir, it is not.

Q. Did you ever know it to be done? A. No, sir.

[120]

“Q. Now, I will ask you to state whether or not the use of the machine, of the Marion steam loader, for hauling in these logs, under the circumstances that I have related, is or is not a reasonably safe machine for that purpose?”

Mr. ELDER.—Just a minute. I object to that for the reason that it calls for an opinion and conclusion of this witness. It has already been ruled upon by the Court once.

Mr. SWAN.—I would like to be heard just a moment, if the Court please, on that. The test in cases of this kind, if there is any cause of action here, is

(Testimony of E. M. Rogers.)

whether or not this machine was a reasonably safe machine for the purpose for which it was used. Now, that is not a matter of common knowledge; it is not a matter which a jury is qualified to pass upon. It must of necessity depend upon the experience and qualifications of the men who have had experience in that line of work. Just the same as a certain locomotive might or might not be a reasonably safe locomotive to use under certain conditions, and no one can testify to that or determine that or even remotely guess at it unless he has some evidence from the party who is experienced in that line of work of that kind. I submit, if the Court please, that this question is proper, and I have at this time, at least qualified this witness to the extent of being permitted to have him answer that question.

The COURT.—The objection is sustained.

Mr. SWAN.—Does your Honor hold that it is objectionable on the ground that it is not the subject for expert testimony?

The COURT.—Yes, it involves a mixed question of law and fact as to what is reasonably safe.

Mr. SWAN.—An exception, please.

The COURT.—Yes.

Mr. SWAN.—Q. Mr. Rogers, can you give me an idea generally as to how many of these machines, or how many companies use these machines in that manner?

A. The Potlatch Lumber Company, Panhandle Lumber Company, [121] Barnhart machine, and the other companies use the American, which is on

(Testimony of E. M. Rogers.)

the same principle.

Q. They are in general use? A. Yes, sir.

Q. All over the country? A. Yes, sir.

Q. And have been for how many years?

A. The Barnhart has been out in this country probably six or seven years.

Q. For skidding purposes within that distance?

A. For skidding and loading, yes, sir.

Mr. SWAN.—You may take the witness.

Cross-examination.

(By Mr. ELDER.)

Q. What is this slide machine you mentioned?

A. It is a machine used on top of the cars, slides across from one car to the other.

Q. Does it have two drums on it? A. Yes, sir.

Q. What are both drums for?

A. One drum is to hoist with and the other is to move the logs.

Q. Isn't it equipped with one drum for the purpose of putting a haul-back line on it?

A. Either way you want it.

Q. Isn't it a fact that you use that machine for the purpose of bringing in logs from three to five hundred feet, with a haul-back on it? A. No, sir.

Q. Didn't you ever see that done?

A. No, sir.

Q. Where did you ever see a Marion steam loader used for the purpose of getting logs and loading them over seventy-five feet from the train? [122]

A. I have seen them used by the Potlatch Lumber

(Testimony of E. M. Rogers.)

Company, the American, and I think I have seen them used in the east a good many different places.

Q. What companies?

A. The Weyerhaeuser people.

Q. Where are they?

A. Minnesota. John O'Brien, a good many of them. I couldn't repeat them right off.

Q. You never operated one of these machines did you? A. I never operated it personally, no.

Q. In your life. You don't know anything about the handling of the machine itself?

A. How do you mean? Operating it personally?

Q. Yes, sir.

A. No, sir, I never operated it myself.

Q. You are the general superintendent of the Blackwell Lumber Company? A. Yes, sir.

Q. Is it a company with the Weyerhaeuser interests? A. No, sir.

Q. Mr. Weyerhaeuser don't own any stock in that company? A. Not a nickel.

Q. Did you say you had seen the Panhandle Lumber Company use these machines? A. Yes, sir.

Q. And you have seen them go out four and five hundred feet for their logs? A. Yes, sir.

Q. Where? A. Along different places.

Q. At what places?

A. I couldn't mention the place. [123]

Q. Can you give us one place where you saw it?

A. I don't know what the name of the place is. It is some spur along the main line—I don't know the station.

(Testimony of E. M. Rogers.)

Q. Do you know who was operating the machine?

A. The Panhandle Lumber Company.

Q. Do you know any man that was working on the machine? A. No, sir.

Q. When was that? When did you see that?

A. I have seen it several times the last four or five years.

Q. Can you give us any particular date or any time? A. No, sir.

Q. Or any particular place where you saw them?

A. Along their line.

Mr. ELDER.—That is all.

Mr. SWAN.—That is all. [124]

[Testimony of R. M. Hart, for Defendant.]

R. M. HART, a witness duly called and sworn on behalf of the defendant, testified as follows, on

Direct Examination.

(By Mr. SWAN.)

Q. State your name. A. R. M. Hart.

Q. You live here in Coeur d'Alene?

A. Yes, sir.

Q. What is your business, please?

A. I work for the Blackwell Lumber Company.

Q. How long have you been employed by the Blackwell Lumber Company?

A. Since its incorporation.

Q. I will ask you to state whether or not you have had any experience in logging operations.

A. At the present time I have charge and superintendence of the logging operations.

(Testimony of R. M. Hart.)

Q. Of the Blackwell Lumber Company?

A. Yes, sir.

Q. How long have you had experience with logging operations in the woods?

A. For the last few years.

Q. About how long—three or four years?

A. Three or four years.

Q. I will ask you to state whether or not you are familiar with what is known as the Marion steam loader.

A. I am familiar with the workings of it.

Q. Have you seen that loader or loaders similar to that in operation? A. Yes, sir.

Q. How many places, or how many machines?

A. Well, all machines, The Blackwell Lumber Company,—while they are not the Marion, they all practically work on the same [125] line when they are skidding.

Q. You have, then, machines similar in character to the Marion, in your company?

A. Except that we do not have a revolving machine. We have had an American; we haven't it now.

Q. The American is about the same as the Marion?

A. It works on the same principle.

Q. Do the other machines you mentioned also work on the same principles, outside of the fact that the boom swings?

A. Yes; the same machine, except that they do not revolve.

Q. Otherwise, they are the same?

(Testimony of R. M. Hart.)

A. Yes, sir; in pulling in the logs.

Q. I will ask you to state whether or not, if you know, the Marion steam loader or one similar to that is customarily or generally used for skidding in logs for a distance of five hundred feet or less.

Mr. ELDER.—I object to that for the reason that the witness hasn't shown himself competent to answer the question.

The COURT.—Sustained.

Mr. SWAN.—Q. Do you know, Mr. Hart, whether machines of that character are in general use over the country?

Mr. ELDER.—I object to that for the same reason.

The COURT.—He may answer yes or not.

A. Yes.

Q. Do you know where they are used?

A. Yes, sir.

Q. I wish you would state where they are used, as far as your knowledge goes.

The COURT.—You mean where he has seen them used?

Mr. SWAN.—Yes, sir.

A. The Panhandle Lumber Company, The Potlatch Lumber Company, the Blackwell Lumber Company. [126]

Q. I will ask you to state whether or not those machines that you have mentioned are used for skidding purposes. A. They are.

Mr. ELDER.—Just a minute.

The WITNESS.—Pardon me, sir.

Mr. ELDER.—I object to that for the reason that

(Testimony of R. M. Hart.)

it is no criterion. It doesn't show general use.

The COURT.—Well, it may go to the jury. Of course, it don't show a general use. The extent of the observation of any witness is somewhat limited. No witness knows all about it. If a witness has observed only a few cases, of course, his observation wouldn't have as much weight with the jury as if he had observed more, but it is material and competent. The answer may state.

Mr. SWAN.—Q. For what distance did they use those machines for skidding purposes?

A. Well, with the loading machines, up to six hundred feet.

Q. That is what I mean, loading machines?

A. Yes, sir.

Q. Beyond that, what is the custom?

A. Either use donkeys or horses, or something of that kind.

Q. State whether or not these machines that you have referred to are equipped with haul-back line and signal cord? A. They are not.

Q. From your observation and knowledge, so far as you have had an opportunity to observe, I will ask you to state whether or not it is customary in this part of the country to use a machine rigged up with a haul-back line for the purpose of skidding logs, within a radius of five hundred feet.

Mr. ELDER.—I object to that for the reason that he confines it to a limited space. The question confines it to this section here. [127]

The COURT.—Overruled.

(Testimony of R. M. Hart.)

Mr. SWAN.—You may answer the question.

WITNESS.—Will you repeat that question, Mr. Reporter? (Last question read.)

Mr. ELDER.—For the further reason that he hasn't shown himself qualified. He is only shown to know of three companies.

The COURT.—Overruled.

A. It is not.

Mr. SWAN.—Q. What is the customary thing under those conditions?

A. When you are using the loader for skidding, distances up to five or six hundred feet, you simply use the cable that is on the drum, and it is taken out by hand. It isn't attempted to put a pull-back cable on for that distance. It would be too burdensome and expensive. For a distance say of fifteen hundred, two thousand, three thousand, or four thousand feet, where you have to use a very heavy cable, of course, it is natural and necessary to have a pull-back cable.

Q. What is the purpose, Mr. Hart, of the haul-back line?

Mr. ELDER.—Objected to for the reason that the witness hasn't shown that he knows; he isn't qualified.

Mr. SWAN.—He has had four or five years' experience.

The COURT.—Overruled.

Mr. SWAN.—You may answer.

A. To take the heavy cable out that pulls the logs in.

(Testimony of R. M. Hart.)

Q. Now, do you know, or have you made any investigations as to whether or not the Marion steam loader, or one similar to that is in general use throughout the country?

A. I have made investigations.

Q. And do you know whether or not it is?

Mr. ELDER.—I object to that.

The COURT.—I don't think it is material to know whether [128] or not the Marion steam loader is in use throughout the country.

Mr. SWAN.—Well, I don't know as I should confine it to the Marion steam loader. I mean other loaders, or machines of a similar character, for the purpose of skidding logs within a radius of five hundred feet.

A. I have investigated that, yes, sir.

Q. Do you know whether they are? Just answer yes or no.

Mr. ELDER.—I object to it for the reason that the witness hasn't shown qualifications.

Mr. SWAN.—If the Court please, I think he could answer yes or no.

Mr. ELDER.—I submit, your Honor, he should state his investigations.

Mr. SWAN.—That is a matter for cross-examination.

The COURT.—I will permit you to cross-examine him as to his qualifications, if he says that he does know. You may answer whether or not you know. Answer yes or no.

A. May I have the question read, please?

(Testimony of R. M. Hart.)

The COURT.—Yes, read the question.

(Last question read.)

A. In general use for a distance of five and six hundred feet?

Mr. SWAN.—Q. Yes. I say, do you know whether or not they are or not?

A. I can only state from my investigations, because we are buying some of the machines now.

Q. That is what I want to know, whether you do or not?

A. Well, I do know that they are used for that, from my investigations, you understand.

The COURT.—The witness, I suppose, didn't understand the ruling. The answer may be stricken out. [129]

Mr. SWAN.—Q. I will ask you to state whether or not you know. Just answer yes or no.

The COURT.—Perhaps this isn't quite fair to the witness, as a layman. You ask the man whether he knew. Often he feels that he does know without having really what we call legal knowledge.

WITNESS.—I have seen a machine work at various distances.

The COURT.—Just a moment, Mr. Witness; I think you may ask him the question directly, Mr. Swan, whether or not the Marion steam loader is used for skidding logs different distances generally throughout the country, and I will permit you to interrogate him as to his qualifications. Don't answer this question yet.

Mr. SWAN.—Q. "I will ask you, Mr. Hart,

(Testimony of R. M. Hart.)

whether or not the Marion steam loader, or one of similar character, is in general use throughout the country for the purpose of skidding logs within the radius of five or six hundred feet?"

A. I do know.

Q. Is it, or is it not? A. It is.

The COURT.—Just a moment. You may cross-examine him as to his qualifications if you desire, Mr. Elder.

Mr. ELDER.—Q. Mr. Hart, what investigation did you make as to the use of the Marion steam loader?

A. We are buying some loaders of a similar character now, and before signing the contract to purchase them, we did investigate them, *as were* particular to find out how far they would skid back, as that is one of the big qualifications of these loaders that turn around.

Q. Did you inquire of the people that make the Marion loader?

A. Not of the Marion people, but of people who have used them for the last twenty years. [130]

Q. Did you make inquiry of the Marion people?

A. No, but of the people who have used the Marion for the last fifteen and twenty, as high as twenty-five years, since they have been on the market.

Q. Have you ever had any dealings with the Marion people at all?

A. With the Marion people?

Q. Yes.

A. The Marion people manufacture this machine,

(Testimony of R. M. Hart.)

and I, as a director of the Panhandle Lumber Company, naturally have had some dealings with them, and of the Idaho-Washington Northern Railroad Company.

Q. Isn't it a fact that they don't advertise their machine as a skidding machine at all, but do advertise it solely as a loading machine?

A. They advertise it as a machine to load logs and to skid alongside of the track for two hundred yards. That is the big qualification of the machine, and the strongest talking point about it, that it will skid logs back two hundred yards.

Q. Was all the investigation you had regarding these machines by correspondence? A. Oh, no.

Q. Where did you examine the machines?

A. Where did we examine them?

Q. Yes.

A. We examined them at the Panhandle Lumber Company, The Idaho and Washington Northern Railroad. Their agent was here, catalogues and pictures.

Q. You never saw any of the machines operated except at those places? A. Well, the Marion?

Q. Yes, or machines of its class and type.

A. Yes, we have seen them operate at the Panhandle, [131] along the I. W. N. Railroad.

Q. That is all the same, isn't it?

A. No, it is two separate and distinct corporations.

Q. Doesn't one company own all of the loaders?

A. No. Possibly one company may own all the loaders. As to who owns the loaders, I believe the

(Testimony of R. M. Hart.)

railroad owns them.

Q. And operates them?

A. And operates them, probably.

Q. Where else have you seen them?

A. I have seen them along the Bovill branch of the Milwaukee road.

Q. That is the Potlatch Lumber Company?

A. That is the Potlatch Lumber Company. Those are Marions we are speaking of. As far as similar machines are concerned, we have owned them ever since the company has been operated and used them practically six, or seven, or eight months out of the year.

Q. And that is the only experience you have had with them? A. Yes, sir.

Mr. ELDER.—We object to the question for the reason that the witness hasn't shown qualifications.

The COURT.—I think I shall sustain the objection.

Mr. SWAN.—An exception.

Mr. SWAN.—Q. Mr. Hart, you have, I believe, watched the operation of these machines for the past several years? A. Yes, sir.

Q. Quite frequently? A. Yes, sir.

Q. "I will ask you to state whether or not, from your experience and observation, those machines are reasonably safe for the purpose of skidding in logs within a radius of five hundred feet?" [132]

Mr. ELDER.—I object to the question for the reason that it calls for an opinion and a conclusion of

(Testimony of Thomas P. Jones.)

this witness, and is incompetent, irrelevant and immaterial.

The COURT.—Sustained.

Mr. SWAN.—An exception. That is all, Mr. Hart.

Mr. ELDER.—That is all, Mr. Hart. [133]

[**Testimony of Thomas P. Jones, for Defendant.**]

THOMAS P. JONES, a witness duly called and sworn on behalf of the defendant, testified as follows, on

Direct Examination.

(By Mr. SWAN.)

Q. State your name. A. Thomas P. Jones.

Q. What is your occupation, Mr. Jones?

A. I am in the employ of the Potlatch Lumber Company.

Q. In what capacity?

A. Superintendent of the wood department.

Q. The logging operations are under your supervision? A. They are.

Q. How long have you been superintendent of the logging department? A. About ten years.

Q. For the Potlatch Lumber Company?

A. Yes, sir.

Q. What experience, if any, did you have prior to that time? A. About twenty-four years.

Q. Do you mean that your woods' experience covers a period of thirty years or more?

A. Yes, sir.

Q. In what parts of the country?

A. Minnesota, Wisconsin—

(Testimony of Thomas P. Jones.)

Q. Where else?

A. No place else, except observation, and right here.

Q. Now, are you familiar with the machine known as the Marion steam loader, and similar machines to it? A. I am.

Q. How long have you been familiar with that machine?

A. I have been familiar with the Marion for about four years; others for about fourteen. [134]

Q. What other machines or similar to the Marion with which you are familiar, and which operate about the same?

A. So far as the operation is concerned, they are all about the same.

Q. Well, the American?

A. I have seen the American work, but never have noticed them—I have used the McGifford, the Crowder, the slides of all descriptions, for the past fourteen years.

Q. I wish you would explain briefly the manner of operating the machines, for loading and skidding logs.

A. The slides are a two-drum machine, and so is the McGifford, equipped with one drum to move the cars under the loader in loading logs, but when we are skidding and loading the one drum is used to move the cars as we load them, and the other to load them. When we go back further then we sometimes equip those with a haul-back and go back from five hundred to one thousand or fifteen hundred feet.

(Testimony of Thomas P. Jones.)

Q. Equip what?

A. Those loaders, with a haul-back, when we go further than the men can pull the cable out; then we use them with a haul-back as far as one thousand feet. We have also used them as far as a thousand or fifteen hundred feet without a haul-back, used a horse to pull it back, when it is too heavy for the men to pull it back.

Q. I will ask you to state whether or not you have been, in the past four or five years accustomed to skidding logs with the Marion steam loader within a radius of five hundred feet.

A. We have.

Mr. ELDER.—I object to that as immaterial.

The COURT.—Overruled.

Mr. SWAN.—You may answer.

A. We have. [135]

Q. Now, do you know of other places, or companies who use the machine for the same purpose?

A. I never saw them used any place except on the Panhandle, and that was for pulling in and loading. I don't know as they went back any more than seventy-five feet, although I saw logs back further, and they probably got them, although I don't know. That is where I went to see them working, with the view of buying them, for the purpose of skidding and loading, short skidding, and for investigation by our company for a year or so, to get loaders to do the short skidding.

Q. You say you had some experience back east?

A. Yes, sir.

Q. Now, you say you used those loaders, or have

(Testimony of Thomas P. Jones.)

used these loaders for the past four or five years?

A. About four years,—well, three years, I think we have really been using them, between three and four years.

Q. Now, do you know of other places where those loaders are used?

A. I know of places by hearsay. I don't know them. I haven't went to see them any place except the Panhandle.

Q. I will ask you to state whether or not you have made any inquiry or investigation about the use of these.

A. We did before we purchased them. Our company made all kinds of investigations.

Q. What kind of investigations did you make?

A. We made investigations by writing to people in the south that had been using them, and in the east that had been using them.

Q. What was the result of your investigations?

Mr. ELDER.—I object to that as hearsay.

The COURT.—Sustained.

Mr. SWAN.—Q. How many loaders of this kind has your company got? [136]

A. You mean the Marion loaders?

Q. Similar loaders?

A. Nine,—eight or nine,—nine.

Q. Do you operate those in the same manner?

A. Yes, sir, we do.

Q. Have you had any experience in other localities in skidding logs within a radius of five hundred feet?

A. I have.

(Testimony of Thomas P. Jones.)

Q. What experience, if any, have you had, and where?

A. I had about twenty-four years in Minnesota and Wisconsin.

Q. Well, during that time, what was the method of skidding those logs?

Mr. ELDER.—I think that is immaterial, your Honor.

The COURT.—Overruled.

A. The last fourteen years,—eighteen years,—I had eight years of experience with loaders prior to coming to the Potlatch Lumber Company.

Q. That is what I wanted to know. What is the character of those loaders?

A. They were these slides, the Cody—I had some Cody loaders.

Q. You had about eight years, you say, there?

A. Yes, sir.

Q. Using a similar machine? A. Yes.

Q. State whether or not you then used a similar machine to this for the purpose of skidding logs back within the radius of five hundred feet.

A. I didn't use the turn-around machines, as they call them; I used those others, the same thing.

Q. I mean a similar machine.

A. Yes, sir, a similar machine. I don't understand [137] what you mean by similar,—one whose works are similar?

Q. One that is operated in practically the same manner.

(Testimony of Thomas P. Jones.)

A. The operation of all of them is practically the same.

Q. Now, what experience did you have back there, if any, in regard to skidding in logs within a radius of five hundred feet?

A. I had eight years of experience with them. We skidded with them for about eight years within a radius of five hundred feet, and sometimes further than five hundred feet.

Q. Did you at that time, or was it customary at that time, to use a haul-back line when skidding logs within five hundred feet of the track?

Mr. ELDER.—I object to that. He confined it to a period too remote from the present-day operations.

The COURT.—Overruled.

Mr. SWAN.—You may answer the question.

A. We never used a haul-back line unless we had to go through timber that was within five hundred feet of the track, to get a lot of timber further back.

Q. Now, based upon your thirty years' or more experience, I will ask you to state whether or not it is customary when skidding logs within a radius of five hundred feet, to use a haul-back line.

A. It is not.

Q. Now, did you see the operation of this Marion loader or a similar machine prior to the time your company purchased it?

A. I never saw the operation except the loader, for the Panhandle Company. I went down there to investigate the machine and looked at it prior to purchasing.

(Testimony of Thomas P. Jones.)

Q. That was when you started your investigations to find out about it? [138] A. Yes, sir.

Q. What is the purpose of a haul-back line?

Mr. ELDER.—Objected to for the reason that he hasn't shown knowledge.

The COURT.—He may answer.

A. To pull a cable back into the woods, the haul-in cable, to save the men doing it, too far, and too expensive.

Q. I might ask you this, Mr. Jones, will you explain to the jury the manner in which the Marion loaders skid in a log for a distance of three or four or five hundred feet, as compared with the other loading or skidding machines that you have known.

A. The difference is, that I think the Marion loader swings around and the others don't. The other loaders have a boom sticking out straight in front, and the *engine* is standing near, the *engine* watching his boom, and the Marion loader swings around where he can see his men in every direction, and he is in plain view of them all the time, unless the cable goes to where he can't see them.

Q. You mean the boom swings around?

A. The whole thing, that is the reason we purchased them to do this work, in preference to the other loaders, because we considered they were safer, the machine swings around where he could see his men all the time.

Mr. ELDER.—I object to what he considered.

Mr. SWAN.—Q. Prior to purchasing this Marion loader, had you used the other machines of the same

(Testimony of Thomas P. Jones.)

character and for the same purpose and in a similar manner? A. We had.

Q. For how long a time?

A. I think we used them here at the Potlatch about seven years.

Q. For skidding and loading? [139]

A. Both for skidding and loading.

Q. "Now, from your knowledge and experience of thirty years in the logging business, I will ask you to state whether or not the Marion steam loader is a reasonably safe machine for the purpose of skidding in logs within a radius of five hundred feet from the track?"

Mr. ELDER.—Objected to as incompetent, irrelevant and immaterial and calling for an opinion and conclusion of this witness.

The COURT.—Sustained.

Mr. SWAN.—An exception. I think that is all.

Cross-examination.

(By Mr. ELDER.)

Q. Now, the slides and this Cody, and similar of these other machines that you have mentioned using, have two drums on them, don't they? A. Yes, sir.

Q. And a haul-back line can be placed on them at any time? A. Yes, sir.

Q. And you frequently did that to go out five hundred feet after logs?

A. We did it when we got out farther than five hundred feet.

Q. And you have done it for five hundred feet?

(Testimony of Thomas P. Jones.)

A. Not unless we had logs further than that and wanted it to go further.

Q. How far would you go with a small machine like a slide?

A. One thousand or fifteen hundred feet.

Q. And the slide works on a car, doesn't it?

A. Sometimes,—it frequently does; sometimes it doesn't.

Q. And the larger machines you work on the ground? [140] A. Yes, sir.

Q. The slides, you load the logs at the same time you pull them in? A. No, sir, you do not.

Q. You can do it if you want to?

A. We can do it if we are only skidding a short distance, but if we are using them as donkey, we don't, but if we are using them as a loader, we do.

Q. That is the difference between the equipment of those machines and the Marion, that is, the difference between the equipment of those machines and the Marion is that they are provided with apparatus for putting on a haul-back line if you desire to do so?

A. Yes, if you desire to use it for that purpose.

Q. And you can also place a whistle-cord or signal device on them, can't you? A. Yes, sir.

Q. And you can't use either of those on a Marion?

A. You could use a whistle-cord if the thing didn't turn around and around.

Q. As I say, it is so constructed that you can't use either of them?

A. No, it wasn't intended for that purpose.

Q. Now, you stated that this haul-back line was for

(Testimony of Thomas P. Jones.)

the purpose of hauling the main cable into the woods?

A. Yes, sir.

Q. Is that the only use for it?

A. The only use I ever knew it to be put to.

Q. Mr. Jones, isn't it a fact that logs coming in with a machine of that kind, equipped with a haul-back cable, all come in on the same general course?

A. All come in on the same general course after you get them into the road. [141]

Q. And they will run along the same track, won't they? A. Yes, unless they run out of it.

Q. What makes them do that?

A. The steady pull on them makes them do it, because the cable is leading them to one place all the time.

Q. Isn't it a fact, Mr. Jones, that if you don't have the haul-back line they won't run in the same track?

A. The haul-back line has no control over them whatever.

Q. Do you mean to tell this jury that in going out one thousand feet with a five-eighth inch cable and that line attached to a log which is being carried in, the weight of that line wouldn't have any effect in holding that log in a certain course?

A. No, sir; it would not.

Q. Can the engineer in running one of those machines control the haul-back line with a brake?

A. Oh, yes, you can control the haul-back line.

Q. Can't you, then, control the other line with that brake? A. Control the other line, yes, sir.

Q. And can stop the log, can't he? A. No, sir.

(Testimony of Thomas P. Jones.)

Q. Why not?

A. Well, I will tell you why. He uses the small line for a haul-back and the large line for a pulling line, and there is usually from twenty to twenty-five feet of the log hanging on what we call a choker, and a chain from twenty to twenty-five feet, that is attached in between where the two lines are attached. When we are skidding logs on a hill where they will run, we find our greatest trouble is to keep the log from unhooking as it runs ahead. Then if you pull up on the haul-back line most invariably they will unhook and [142] run ahead, run out of the rigging altogether, and they do anyhow, run off the road, unhook and run off the road, and when we are pulling they frequently take a shoot off that way,—twenty-five feet of loose cable there, they are liable to run in behind a stump.

Q. Do you mean, Mr. Jones, that some of those lines are not over six feet long?

The COURT.—Do you mean the choker lines?

A. Well, the chain is six feet long that we hook our chokers on to; our chokers are all made twenty feet long, and then we have tag lines from forty feet to seventy-five feet that we frequently use to bring them in out of the woods.

Q. When you use those tag lines to pull the logs in you then take the log off and fasten it on to the line? A. We most invariably do that.

Q. And with a line not over six feet long?

A. No,—our chokers are twenty feet long that we make. Our timber is small, as a rule, and we make

(Testimony of Thomas P. Jones.)

them twenty feet long. Where they skid larger timber, they make them longer.

Mr. ELDER.—That is all.

Mr. SWAN.—That is all, Mr. Jones. [143]

[Testimony of A. C. Toms, for Defendant.]

A. C. TOMS, a witness duly called and sworn on behalf of the defendant, testified as follows, on

Direct Examination.

(By Mr. SWAN.)

Q. What is your name? A. A. C. Toms.

Q. Where do you live? A. Spokane.

Q. What is your business?

A. I am engineer at the McGoldrick Sawmill at Spokane, run a machine-shop and look after the machines in general.

Q. I will ask you to state what experience, if any, you have had in wood's work and logging operations.

A. Well, in wood's work, in the woods proper, I have never had any in this section of the country, other than to look after the machinery.

Q. How long have you looked after the machinery?

A. Why I have looked after machinery for various companies, while in the employ of the Union Iron Works, for the past ten years.

Q. How long have you been in the lumber business?

A. Three years past, that is, in this country.

Q. Well, altogether?

A. About eighteen or twenty years.

Q. Eighteen or twenty years in the lumber busi-

(Testimony of A. C. Toms.)

ness? A. Yes, sir.

Q. How much of that time have you been familiar, if at all, with skidding and loading machines?

A. About thirteen years.

Q. What kinds?

A. Various kinds, the McGifford, The Clyde and then the slides they tell about, equipped with a steam hoisting engine, and I have seen the Barnhart and the American. There are some [144] made over here in Washington by the Washington Machinery Company.

Q. Have you seen them operated and used for the purpose of skidding? A. Yes, sir.

Q. What did you see, at what places?

A. I saw them used over here at Lof Bay for the McGoldrick Lumber Company, and I saw them used over on the—I don't know as you would call that skidding—over here on the Coeur d'Alene branch that runs by—it is a branch that runs down to Bay View on Lake Pende O'Reille. Last year there was a lot of logs put in there by the farmers, I believe, and they were scattered over a considerable territory, and last spring we used a McGifford there and we went back after those logs as far as the road was extended.

Q. About what distance was that?

A. Well, I should judge in the neighborhood of four hundred feet.

Q. Have you seen them,—or was there a haul-back line on that? A. No, sir.

Q. Did you see these machines, or see any of them

(Testimony of A. C. Toms.)

in operation in any other part of the country?

A. I saw them on the Blackwell road or Idaho & Washington Northern, and I have seen them in operation in the Lumber Company out of Springdale.

Q. Any other places that you can think of?

A. We used them about fourteen or fifteen years ago in Minnesota.

Q. Have you seen them used for the purpose of skidding logs within a radius of five hundred feet?

A. Yes, I have.

Q. Are you familiar with the work of skidding logs in the woods?

A. I am familiar with how it is done. While I have never [145] had any thing to do with the skidding, I have always had to keep the machines in order and put them in order and I saw how they did this work.

Q. To what extent have you seen it done?

A. You mean the quantity?

Q. Oh, no, times, the number of times just approximately? A. Oh, two or three hundred times.

Q. You say the McGoldrick Lumber Company operates some of these machines?

A. How is that?

Q. Did you say the McGoldrick Lumber Company operates some of these machines?

A. The McGoldrick Lumber Company operated a Clyde over at Lof Bay and operated a McGifford and has been for the past six or seven years on the Idaho and Washington Northern or along their line, and the International.

(Testimony of A. C. Toms.)

Q. They use those for skidding?

A. I never saw them use them, not that particular one, for the purpose of skidding out of the woods, any more than the logs brought in by the farmers and scattered around.

Q. What distance out have you seen them used for skidding?

Mr. ELDER.—I submit your Honor, he says he hasn't seen them used.

A. Not that particular one.

Mr. SWAN.—Well, any of them?

A. I have seen them skid for four or five or six hundred feet. I didn't measure the distance, but from observation, about that distance.

Q. Did they operate them with a haul-back line?

A. No, sir.

Mr. SWAN.—You may take the witness.

Cross-examination.

(By Mr. ELDER.) [146]

Q. That was a Clyde and a McGifford and a Cody that you have seen work?

A. Well, I saw the American.

Q. Well, all those machines are equipped with a haul-back line aren't they?

A. They are equipped with two drums but not generally used with a haul-back line, generally used for moving cars. The Clyde pulls the cars through over the stops of the wheels, and the McGifford comes down on the ties and pulls the cars through under the wheels, and that line is generally used on the second drum for that purpose.

(Testimony of A. C. Toms.)

Q. But they do use them at times with a haul-back line? A. I have seen them; yes.

Q. And the distances are not more than five hundred feet?

A. I never saw a haul-back line strung out for a distance of five hundred feet in my life.

Q. You never did any work in the woods?

A. No, sir.

Q. You never helped operate any of these machines? A. I have operated them.

Q. Where?

A. For the McGoldrick Lumber Company, this side of what is called Bay View.

Q. How long?

A. For a few hours at a time probably, to see that the machine is in proper shape for turning it over to the workmen.

Mr. ELDER.—That is all.

Mr. SWAN.—That is all, Mr. Toms. [147]

[Testimony of Norris P. Murphy, for Defendant.]

NORRIS P. MURPHY, a witness duly called and sworn on behalf of the defendant, testified as follows, on

Direct Examination.

(By Mr. SWAN.)

Q. What is your name? A. Norris P. Murphy.

Q. Where do you live? A. Bovill, Idaho.

Q. What is your business?

A. I am assistant superintendent in the woods there.

Q. Assistant superintendent of the woods?

(Testimony of Norris P. Murphy.)

A. Yes, sir.

Q. How long have you held that position?

A. About five years.

Q. How long have you been connected with the woods department of the Potlatch Lumber Company?

A. About six and a half years.

Q. How long or how much experience have you had in logging, or logging operations in the woods?

A. Sixteen or seventeen years.

Q. At what places?

A. Minnesota, Michigan, Wisconsin and here.

Q. Minnesota Michigan, Wisconsin and out here?

A. Yes sir.

Q. Covering a period of sixteen years?

A. Yes, sir.

Q. I will ask you to state, Mr. Murphy, if you are familiar with what is known as the Marion steam loader.

A. Yes, I am.

Q. And are you also familiar with other machines that have been mentioned here in this case, similar to that, the Cody, and McGifford and the American?

A. Yes, sir. [148]

Q. The slides?

A. Yes, sir.

Q. And also a donkey, I suppose?

A. Yes, sir.

Q. Have you seen a Marion steam loader or other loaders of a similar character in operation?

A. Yes, sir.

Q. At what places?

A. I have seen them at the Potlatch, in Wisconsin, Smith & Company, Duluth, Marshall M. E. Lumber

(Testimony of Norris P. Murphy.)

Company at Duluth, Hines Lumber Company, Wisconsin.

Q. Any other places in Wisconsin?

A. Yes, Murphy & Sons, Green Bay.

Q. Where else?

A. Hermesville Lumber Company, Hermesville, Michigan.

Q. What places, if any, out in this part of the country? A. None here, only the Potlatch.

Q. I will ask you to state whether or not at any of those places they used those machines for the purpose of skidding logs within a radius of five hundred feet.

Mr. ELDER.—I object to that as not a proper question. The question is whether they are in general use. Any one place wouldn't be the question.

The COURT.—Overruled.

Mr. SWAN.—You may answer.

A. Yes.

Q. What places? A. Pretty near all of them.

Q. Were they at those different places used for skidding logs within a radius of five hundred feet?

A. Yes, sir.

Q. How many of them approximately?

A. Well, you might as well say all of them. [149]

Q. Do you think practically all of those places?

A. Yes, sir.

Q. Is there any place you know of that you have mentioned that they didn't use them?

A. No, no place I know of.

Q. In what respect, if any, does the Marion loader

(Testimony of Norris P. Murphy.)

differ from those others in regard to operating as a skidding machine?

A. All the difference there is in the Marion from the slides and McGifford and Cody's is that the Marion turns around and they are stationary.

Q. Aside from that, they are operated on the same principle?

A. Same principle exactly, and answer the same purpose.

Q. Now, the times that you saw these machines used for the purpose of skidding in these logs within a radius of five hundred feet, state whether or not they were operated by or with a haul-back line.

A. No.

Q. Now, from your experience, which you say has covered fifteen or sixteen years? A. Yes, sir.

Q. In various parts of the country?

A. Yes, sir.

Q. From your experience, I wish you would state whether or not it is customary in skidding in logs for a distance of five hundred feet from the track to use a haul-back.

A. No, it is not, not with the loader, where you are loading them.

Q. Well, any of those machines, I mean. A. No.

Q. What is the purpose of a haul-back? [150]

A. The purpose of a haul-back is to haul the big cable back in the woods after your timber.

Q. "Now, Mr. Murphy basing your answer and opinion upon your own experience and observation, covering a period of sixteen years, I will ask you to

(Testimony of Norris P. Murphy.)

state whether or not the Marion loader is a reasonably safe machine for the purpose of skidding logs within a radius of five hundred feet."

Mr. ELDER.—I object to that as incompetent, irrelevant and immaterial, and calling for the opinion and conclusion of this witness.

The COURT.—Sustained.

Mr. SWAN.—An exception.

Q. How long, Mr. Murphy, has the Potlatch Lumber Company been using Marion steam loaders and other loaders of a similar character for skidding in logs within a distance of five hundred feet?

Mr. ELDER.—Objected to as not binding upon this plaintiff, Mrs. Harkins.

The COURT.—Overruled.

A. They were using them as I came here and they have used the Marion ever since they got them.

Q. You say since you came there,—six or seven years ago?

A. Yes, they were using the other loaders when I came there for that purpose.

Q. Were they equipped with a haul-back, or *with* they operated with a haul-back, while skidding in within that radius?

A. Not when they were loading.

Q. Or for skidding short distances? A. No.

Mr. SWAN.—I think that is all.

Cross-examination.

(By Mr. ELDER.) [151]

Q. You say you never saw one of those machines skidding with a haul-back five hundred feet, four or

(Testimony of Norris P. Murphy.)

five hundred feet? A. No, sir.

Q. Did you ever operate a machine of that class yourself? A. I have operated them all, yes, sir.

Q. For the company here?

A. For this company and for others.

Q. In what capacity?

A. Top loaded on them and hooked on them.

Q. Did that while you was assistant superintendent? A. Well, sometimes a carload or so—

Q. Now, there aren't any of those machines that you mentioned that are exactly like the Marion steam loader? A. Not in appearance; no.

Q. Well, in construction, in general construction, I mean? A. No, not in construction.

Q. They all have a stationary boom, don't they?

A. Yes.

Q. And they are equipped with two drums?

A. Yes.

Q. And those drums can be used for a haul-back cable, if you so desire? A. Yes.

Q. And they are used at times for the purpose of skidding out a haul-back? A. Yes, sir.

Q. And when you are not loading and are using your machine for the purpose of skidding, you do use the haul-back too, don't you? A. Yes, sir. [152]

Mr. ELDER.—That is all.

Redirect Examination.

(By Mr. SWAN.)

Q. Within what distance?

A. Up to fifteen hundred, sixteen hundred, or seventeen hundred feet.

(Testimony of Norris P. Murphy.)

Q. Did you ever use it within a radius of five hundred feet? A. No.

Q. I will ask you to state whether or not it is practicable to rig up a haul-back and use that in skidding in logs within a radius of five hundred feet .

A. No, it wouldn't be, I don't think.

Q. What is that? A. I don't think it would.

Mr. SWAN.—That is all.

Recross-examination.

(By Mr. ELDER.)

Q. You mean to say, Mr. Murphy, if you had a bunch of logs scattered over a hillside, and the logs further away were five hundred feet, it wouldn't be feasible to put your haul-back line on to bring those logs in?

A. No, not if those logs were right by the machine; of course, if you were going back five hundred feet for the first of the logs, it might be.

Mr. ELDER.—That is all.

Redirect Examination.

(By Mr. SWAN.)

Q. If you had to go five hundred feet back into the woods, would you rig up a haul-back for the purpose of going out just that five hundred feet and getting that bunch of logs? A. No, sir.

Q. Is it customary to do so? [153] A. No.

Mr. SWAN.—That is all. [154]

[Testimony of Michael J. Ward, for Defendant.]

MICHAEL J. WARD, a witness duly called and sworn on behalf of the defendant, testified as follows, on

(Testimony of Michael J. Ward.)

Direct Examination.

(By Mr. SWAN.)

Q. State your name to the reporter.

A. Michael J. Ward.

Q. Where do you live? A. Coeur d'Alene.

Q. How long have you lived here?

A. I have lived here in Coeur d'Alene City two months, but I have been here about nine years.

Q. What is your business?

A. Well, I have been superintendent for the Blackwell Lumber Company in the woods department at Mica Bay for four years.

Q. What experience have you had in logging operations? I will first ask you how long you have been engaged in logging operations.

A. Twenty-five or thirty years. That is all I have ever done.

Q. Were you in the woods during that time?

A. Mostly all the time.

Q. Where?

A. Well, all the way from Michigan to Coeur d'Alene City, from Saginaw, Michigan.

Q. In a number of different localities, or only a few? A. Well, not very many.

Q. Well, about how many? A. About five.

Q. Can you name them?

A. Saginaw would be one, and Bangaw on the upper peninsula would be the second one. Superior and Duluth would be the third. [155] Grand Rapids would be the fourth and Coeur d'Alene,

(Testimony of Michael J. Ward.)

Idaho, would be the fifth, and in British Columbia for one winter.

Q. That covers a period of some twenty-five or thirty years, you say?

A. Yes, sir, about thirty years.

Q. Are you familiar, Mr. Ward, with logging operations in those various places?

A. Pretty well, yes, I think so.

Q. Are you familiar with what is known as the Marion loader and other machines of a similar character?

A. Not very with the Marion; I am with others.

Q. Do you know what a Marion is?

A. Yes, I have seen them working.

Q. Do you know or are you familiar with, other machines of a similar character? A. Yes.

Q. Loaders? A. Yes.

Q. Now, have you ever seen, or do you know of those Marion loaders or machines of a similar character being used for the purpose of skidding logs within a radius of five hundred feet?

A. Yes, I do.

Q. Where?

A. Well, most any of the last three places I have mentioned, through Minnesota, but not back as far as Michigan, because I never knew of any back in that country.

Q. You never knew of any back there?

A. No, sir.

Q. How long have you known of these machines to be in operation in that kind of work?

(Testimony of Michael J. Ward.)

A. I believe the first one I saw was in '92. [156]

Q. Now, at the times that you have seen these machines, or operated them or observed their operation, were they used with a haul-back line?

A. I never saw one, not while they were used for loading.

Q. Within a radius of five hundred feet?

A. Not when they were using them for loading.

Q. For skidding five hundred feet? A. No.

Q. I will ask you to state whether or not, from your experience in logging operations, it is customary in skidding logs within a radius of five hundred feet to use a haul-back.

A. No, I never saw one used, not on a loader machine.

Q. What is the purpose of a haul-back?

A. Well, a haul-back is to transfer a large line back into the woods, you know, so as to get logs for a greater distance than what a loader would go to; that is, on a donkey, where you go back two or three thousand feet, they use haul-backs, because the cable is too heavy.

Q. Is it practicable to equip a machine for the purpose of skidding in logs within a radius of four or five hundred feet with a haul-back? A. No.

Q. Now, you say you are familiar with these loading machines such as have been described here?

A. Yes, I am pretty familiar with them, outside of the Marion. I have just seen them working; I never worked on them.

Q. You have seen a Marion?

(Testimony of Michael J. Ward.)

A. Yes, I have seen them working.

Q. And the principle is practically the same as on the others, the operations?

A. Yes, practically the same. [157]

Q. What did you say?

A. It is about the same, only it is a swinging boom.

Q. A swinging boom?

A. It is a swinging machine.

Q. You mean the boom swings around, revolves?

A. Yes, the machinery is practically the same.

Q. And the manner of operation is practically the same? A. Just the same, yes.

Q. "Now, basing your answer or your opinion upon your twenty-five or thirty years' experience in the woods, in logging operations, and your knowledge and observation of machines similar to the Marion, I will ask you to state whether or not, in your opinion, those machines are reasonably safe for the purpose of skidding logs within a radius of five hundred feet."

Mr. ELDER.—Objected to as incompetent, irrelevant and immaterial, and calling for an opinion and conclusion of this witness.

The COURT.—Sustained.

Mr. SWAN.—Note an exception. Take the witness.

Cross-examination.

(By Mr. ELDER.)

Q. The machines you work with are all equipped with two drums? A. Yes, sir.

Q. And that second drum can be used for a haul-

(Testimony of Michael J. Ward.)

back? A. Yes, sir, it can.

Q. And it is used for a haul-back when skidding with the machine? A. When skidding.

Q. When they are not loading?

A. When you are not loading, you can use it for a haul-back, yes. [158]

Q. And then you do use it?

A. Yes, if you are skidding, you can use it if you need it.

Mr. ELDER.—That is all.

Redirect Examination.

(By Mr. SWAN.)

Q. I think you said, Mr. Ward, that the purpose of a haul-back was to carry the tackle out into the woods after the logs had been hauled in, where they had to go away back a long distance?

A. To transfer the big line, on a donkey, or something like that, to haul the big line back, the heavy line.

Q. Is it used for the purpose of steadying logs as they are dragged in? A. I never knew it to be.

Q. You say you never knew it to be used for that purpose?

Mr. SWAN.—I think that is all.

Recross-examination.

(By Mr. ELDER.)

Q. Did you ever operate a machine yourself, Mr. Ward? A. Run the engine?

Q. Yes. A. Well, I have hold of them, yes.

Q. Did you ever operate them, though?

(Testimony of Michael J. Ward.)

A. I have had hold of them and run them to put in a log, but not steady.

Q. You mean you have merely taken the engineer's place for a few minutes?

A. Yes, just for a while, maybe for a half hour, or something like that.

Q. If you was skidding logs and going more than five hundred feet, after you got within the five hundred feet, would you take your haul-back line off and haul the next of the logs in without it? [159]

A. Well, on some occasions they do; it depends upon the ground and depends on a good deal.

Q. You can take the line back a great deal faster with a haul-back than you can by hand, can't you?

A. If it is already hung up—

Q. And it only takes a few minutes to string it up, doesn't it?

A. Well, I don't know hardly how I would answer that question.

Q. Well, it doesn't take but a short space of time to put it into place?

A. How much would you have to but in place?

Q. Five or six hundred feet?

A. Well, it would take quite a little while to string out five or six hundred feet.

Q. It takes four men to run it without the haul-back being on, doesn't it?

A. Well, it takes the same men, I think, about the same men; I don't think it makes any difference in the man.

Mr. ELDER.—That is all.

Mr. SWAN.—That is all.

Defendant rests.

Mr. ELDER.—That is all.

The COURT.—Gentlemen, do you want to argue this case this evening?

Mr. SWAN.—I would rather not. I desire to make a motion and would like the permission of the Court to argue the motion to some extent, at least. If it is convenient for the Court, I would like to start in at a quarter past nine, to-morrow.

Mr. ELDER.—I would much prefer, your Honor, to submit the case to-night, if it is possible, because we are pretty busy and have some other cases coming up in the other courts. If it is possible. I [160] don't want to inconvenience counsel, but if it is possible to submit it to-night, I would much prefer to do that.

Mr. SWAN.—I am not prepared to stay over here to-night unless it is absolutely necessary. I would like to go back on the five thirty-five train and be here again in the morning at nine o'clock. I don't like to insist upon it or inconvenience the Court in any way, but I do feel as though—

The COURT.—The only difference is that if we let it go over until to-morrow morning we may be without a jury for the rest of the day; that is the only reason I would have to prefer that it be submitted to-night. However, counsel has been here a fairly long day, and I don't like to insist upon it.

Mr. SWAN.—I would like very well to have it go over, if the Court could accommodate me in that way. I would very much prefer to go home this evening, as I have some matters that I really ought to attend to this evening.

Mr. ELDER.—The train, I think, leaves at six thirty-five and we could submit it prior to that time.

Mr. SWAN.—I don't like to be placed in a position where I can't argue this matter, your Honor. I desire to be heard upon that.

The COURT.—Gentlemen of the Jury, you may be excused until nine-thirty to-morrow morning. I will hear your motion now, Mr. Swan.

The jury thereupon retired from the courtroom.

The COURT.—That is, if you can submit it in half an hour. I don't want to interfere with your return to Spokane. At least I will hear you for a time.

[Motion of Defendant for Instructed Verdict.]

Mr. SWAN.—If the Court please, the testimony being all in, and defendant and the plaintiff both having rested, defendant moves the Court to instruct the jury to bring in a verdict for the defendant, for the [161] reason and upon the grounds that the plaintiff has failed to show any actionable negligence or any negligence of any kind upon the part of the defendant, whereby the deceased met his death; that the evidence shows conclusively that the defendant was guilty of no negligence whatever in the premises, and that the accident was due solely and alone to an accident which could not have been foreseen or anticipated; that the evidence further shows that the

Marion steam loader was a reasonably safe machine for the purpose for which it was being used at the time, and that it is a machine which is in general use throughout the country; that the evidence further shows that the deceased, in entering in, upon and remaining in the employment of the defendant in the work in which he was engaged at the time, assumed all risks and dangers incident to the operation of the machine in the manner in which it was being operated at the time. The evidence fails to show that there was anything defective about the machine, but, upon the contrary shows that it was in good and proper condition, and that the accident, if due to the negligence of anyone, was caused by the negligence of the deceased's fellow-servant. In cases of this kind, of course, the plaintiff must prove negligence, and, failing to show any negligence on the part of the defendant, there is nothing on which the jury would be permitted to base a verdict or guess in cases of this character. The facts in this case only go to this extent; they allege in their complaint that we used a Marion steam loader, which was not adapted or suitable for the purpose for which it was being used at that time, and there isn't one word of testimony in this case that that machine was not a suitable machine for that purpose, nor one word that it was not adapted for that purpose.

(Argument of motion by counsel.)

[Order Denying Motion of Defendant for Instructed Verdict.]

The COURT.—Gentlemen, as I view the record here, there [162] is some evidence tending to show

a departure from custom, referring to the phraseology of the last case, which is doubtless well reasoned, that is, there were several witnesses upon behalf of the plaintiff whose testimony tends to show that this device or machine was designed for the purpose of loading logs from points near the cars upon which they are being loaded, and was not intended to be used for the purpose for which it was being used at the time of this unfortunate accident,—testimony from which it at least inferentially appears that it was not equipped with the ordinary devices which accompanied skidding machines, strictly speaking. Now, the evidence goes further and tends also to show the other element referred to in this last case, and that is that this departure was attended with greater hazard than the customary way. Just what weight we should give to this evidence is another question, and a question for the jury, and not for the Court. That evidence is to the effect that where the customary method as contended for by the plaintiff, is followed, viz., a skidding machine with a haul-back line and a signal wire or cord, or especially the haul-back line, that this haul-back line may be used and is used for the purpose of steadying the moving log and keeping it within range of a certain line or course, and that it cannot swing so far or so readily from the course upon which it is being drawn. I can only say in addition to this that the impression made upon me by the evidence for the plaintiff, when the plaintiff closed her case, was that the defendant had been negligent. If the testimony on behalf of the defendant is to be credited, it was not negligent. Its

testimony very strongly tends to show that it was not negligent, and if the jury believes it, of course, they should find for the defendant, but it is for the jury to say upon which side the truth lies in that respect. For that reason the motion will be denied. [163]

Mr. SWAN.—Allow us an exception.

The COURT.—Yes.

Mr. SWAN.—Do we begin at half-past nine to-morrow?

The COURT.—Yes.

An adjournment was thereupon taken until 9:30 A. M. Saturday, November 22, 1913. [164]

At 9:30 A. M., Saturday, November 22, 1913, the Court resumed its session and the following proceedings were had, to wit:

(Argument of case to jury.)

Instructions to Jury.

The COURT:

Gentlemen of the Jury, as you have already learned, this action is brought by Susan Harkins against the Potlatch Lumber Company, for the purpose of recovering from the Lumber Company, the sum of twenty-five thousand dollars damages, which she claims she has suffered because of the death of her husband while he was employed by the defendant company in its logging operations in this State. Most of the incidental questions involve no dispute or controversy of fact. In other words, it is admitted that Mrs. Harkins is the surviving widow of the deceased, and that she is the only heir, and therefore, under the statutes of the State, she has a right to maintain the action, the general rule of law in that

respect being that where one has been killed through the wrongful conduct of another, or the wrongful conduct of the employees of another person or corporation, the surviving heirs may recover damages from the person guilty of the wrong, or the employer of such person. The gist of the action, or controlling issue, involves the question of negligence. In other words, the plaintiff here relies, and must rely, upon her charge in the complaint that the defendant, through its agents and employees was guilty of negligence, and that negligence resulted in the death of Mr. Harkins. In no view of the case can you find in favor of the plaintiff, unless you find, first, that the defendant was negligent, substantially in the manner alleged in the complaint, and second, that the death of Mr. Harkins was due to such negligence.

There is, as I will explain to you further along, [165] still another question, and that is as to whether or not the deceased assumed the risk of the danger. If he did so assume the risk, the plaintiff here could not recover, even though the defendant was negligent as alleged.

I may say to you that in general negligence may be defined in this way: It is the doing of something which an ordinarily intelligent and prudent person, would not, under like circumstances, do, having regard for the rights of others, or the leaving undone, under such circumstances, of something which an ordinarily prudent person, having regard for the rights of others, would do. You see, it may be either positive or negative. If you do something which an ordinarily prudent person would not do, that is posi-

tive negligence. If you leave undone something which you ought to do, because an ordinarily prudent person would have done, then you are guilty of negative negligence.

The particular or specific negligence charged in this case is that while the deceased was in the employ of the defendant, engaged in logging operations, it put him to work with an appliance, or directed him to assist in a method which was not suitable for carrying on such operations; more specifically, that it used what is referred to in the record as a Marion log loader, which the plaintiff contends is designed only for loading logs, and not for skidding them, and that the loader is not adapted and suitable for skidding logs, for the reason that it is not provided with any signal device, and, second, that it is not provided with what is referred to as a haul-back. Those are the specific issues. It is denied by the defendant that the Marion loader is not suitable for this purpose, and it is denied that the method employed at the time and the device used are more dangerous than other devices, and it is further contended, as you have heard, that this machine and machines of a similar character, working upon like principles, [166] are in common use in logging operations throughout the State here, and indeed in other States. Now, as I have already indicated to you, it is necessary for you to find that the defendant was negligent substantially in the manner charged in the complaint, before you would be warranted in finding a verdict in favor of the plaintiff in any view that you may take of other features of the case. And furthermore, if you

should find that the defendant was negligent as charged, you cannot find in favor of the plaintiff and award to her any damages if you should further find under the general instructions which I shall give to you upon that subject that the deceased assumed the risk of his employment, that is, was aware of the devices and methods which were being employed at the time, and appreciated the danger therefrom. I will explain that a little more fully to you. In other words, you must find, before you can find in favor of the plaintiff, that the defendant was negligent and that the deceased did not assume the risk of the employment. I may say to you, Gentlemen, that no presumption of negligence on the part of the defendant arises from the mere fact that Mr. Harkins was killed or that this accident occurred. You are all men of experience, and some of you, I think, stated upon your examination touching your qualifications to serve as jurors that you are experienced as woodsmen; but however that may be, you will all understand that there are dangers of one kind or another necessarily incident to an employment of this kind, as there are dangers incident to almost all employments, and, therefore, we have what are sometimes called unavoidable accidents, accidents that no reasonably prudent person could anticipate, and for which no one is morally responsible. Sometimes in the simpler walks of life, the least hazardous vocations of life, accidents occur. So I say that you have no right to infer that the defendant was negligent merely because an accident occurred and Mr. Harkins was killed as a consequence [167] thereof.

Nor does it necessarily follow that the method and device here used were improper because this particular accident might have been avoided, if some other method or appliance or device had been used. "To explain, suppose the defendant had employed some other method by which certainly this accident could not have happened; still that method might have been attended with danger of other accidents, that is, accidents of a different kind; as an illustration, if horses had been employed for hauling in these logs this particular accident of course would not have occurred; it couldn't have occurred in just this way. But the question would still remain whether this method is more hazardous (and unreasonably hazardous) than the method of skidding logs by the use of horses.

So, referring to the matter of using a signal device and a haul-back line, possibly this particular accident might have been avoided, but you would not be justified in concluding that this is an improper method or a negligent method simply or merely from the fact that you may conclude that this accident could have been avoided. The question still remains for you to answer, namely: whether this method was more hazardous than the other referred to, namely: the haul-back." It seems that in using the haul-back line it is necessary, for instance, to draw in logs by the use of temporary lines (I have forgotten just what the name was), to haul them in from some distance, to the main line. Is that process accompanied with dangers? Are the dangers of that method greater or less than the dangers of this method?

Now, I refer to these considerations in order to direct your attention to the rule which prevails in cases of this character, and in order also to impress you with its reasonableness. That rule is this, the duty of the employer, here the Potlatch Lumber Company (and I state it to you in a general way, and then you will apply it to the particular facts), the measure of the employer's duty is to exercise ordinary and reasonable [168] care to supply the employee with appliances and places and methods of work which are reasonably safe, but not necessarily always the newest or safest appliances. Sometimes it is not definitely known whether a very new appliance is going to turn out to be safe or not. Not extraordinary safeguards, but such as men of reasonable intelligence and prudence, and possessed of due and ordinary regard for the safety of life and limb, employ or would employ. Some men may employ one method and some another. Some men may think one method a little safer than another. It doesn't follow that either one is negligent because different methods are employed. The question is whether any of them are using a method or using a device which intelligent men, reasonably prudent men, who have ordinary and reasonable regard for the safety of others, are using. If they use such a method, that is, one that is reasonably adapted to protect from danger or against danger, then there is no negligence, even though some other man might employ another method, even though it is not entirely clear which is the better of the two. So your inquiry here should be, did the defendant, in employing the Marion

loader, under the conditions under which it was employed, for the purpose for which it was used at that time, exercise such intelligence, prudence and regard for the safety of its employees as men of ordinary intelligence and prudence, and with regard for the safety of others, ordinarily employ and exercise? Now, if you should find that the defendant was not negligent under those rules which I have laid down for you, your duty is at an end, and you should return a verdict for the defendant. If, upon the other hand, you find that it was negligent, then you should pursue your inquiry further, and a necessary question is, whether or not Mr. Harkins assumed the risk of his employment at the time and under the circumstances under which the accident occurred. Upon this point, I advise you as follows: [169]

It is the general rule that an employee cannot recover damages for an injury resulting from the negligence of the employer, where the conditions constituting such negligence are known to the employee, or are obvious and plainly observable by him; provided further also, the peril therefrom is appreciated by him, or is clearly apparent. The reason or principle upon which this rule rests is that where one continues in the employment under conditions of which he is aware, and the dangers from which he understands, he thus impliedly consents or agrees to work under such conditions and himself to assume the risks and hazards thereof. Under this rule, if you find here that Mr. Harkins appreciated the dangers of logging or skidding logs in the manner and with the device employed at the time of the accident,

and though having such knowledge and appreciation continued in such employment, then you must further find that he assumed the risk, and the plaintiff cannot recover. The evidence leaves no doubt that he had knowledge of the manner in which the skidding was being carried on, and the only question upon this branch of the case is whether his experience and intelligence were such as to enable him to appreciate and that he did appreciate, the dangers therefrom. If you should find that the defendant was negligent, and that Mr. Harkins did not assume the risks, then there is still the further question for you, and that is, the amount of the damages which you will award to this plaintiff. She will be entitled to recover damages from the defendant, and it will be for you to consider what amount should be awarded. The statute has fixed no precise or specific rule, and it is left to the reasonable discretion of the jury to fix the amount, in the light of all the circumstances in evidence in the case. You will consider here the age of Mr. Harkins at the time the accident occurred, his vocation, his physical condition, the amount which he was capable of earning, or was likely to earn, his relation to the [170] plaintiff as her husband, and all other circumstances in evidence, and you will award to her such amount as in your judgment you think she is entitled to, based upon those circumstances and relations.

It is necessary for all of you, Gentlemen, to concur in a verdict. In the State court three-fourths of you can do so, but here, all of you must agree.

Two forms of verdict have been provided, one of

which is simply for the defendant; in case you find for the defendant, your foreman will sign that form. In the other case, a blank is left after the words "sum of" in which you will enter the amount which you award to her. After making such entry, your foreman will sign the verdict.

Mr. SWAN.—I think the Court perhaps inadvertently overlooked instructing the jury as to the burden of proof in the case.

The COURT.—Yes. The burden of proof in a case of this kind is upon the person who asserts the existence of a fact, so that the burden of proof is upon the plaintiff to show that the defendant was negligent in the manner and form alleged; and she must show that by a preponderance of the evidence. Upon the other hand, the burden is upon the defendant to show that Mr. Harkins assumed the risk of the employment, and the defendant must show that by a preponderance of the evidence, if it would succeed. In either case, a preponderance of the evidence is not evidence convincing you beyond a reasonable doubt, but simply a greater weight of the evidence, that which, under the circumstances convinces your judgment.

The COURT.—Gentlemen, you may take your exceptions.

[Exceptions to Instructions.]

Mr. SWAN.—The defendant excepts to that portion of the Court's instructions which stated that the question for the jury to decide was whether the use of the Marion steam loader, as it was being used at the time of this accident, was more hazardous than if

used with a haul-back. [171]

The COURT.—Did I state that?

Mr. SWAN.—You used those very words. I wrote them down—more hazardous than with a haul-back. It was about halfway through your instructions.

Mr. ELDER.—I didn't so understand.

The COURT.—I can't believe that the jury would get that impression, that that was the instruction; I think I shall leave it as it is.

Mr. SWAN.—Very well, allow the defendant an exception.

The COURT.—Do you desire to take any exceptions, Mr. Elder?

Mr. ELDER.—No.

Administer the oath to the bailiff, Mr. Clerk.

(Bailiff sworn.)

The COURT.—Gentlemen, you may retire.

(Jury retired from courtroom in charge of bailiff.)

Whereupon the jury retired and after an absence returned into court on the 22d day of November, 1913, with a verdict in favor of plaintiff for damages in the sum of \$5,000.00 against the defendant. Thereafter and within the time allowed by law defendant moved the Court for a new trial in said cause, which motion came on regularly for hearing before the Court upon the 2d day of December, 1913, both parties being present and represented by their respective counsel, and which motion was by the Court denied, to which ruling defendant by its attorney then and there excepted and exception was allowed. Whereupon and thereafter and on the 22d

day of November, 1913, judgment was rendered and entered upon said verdict in favor of plaintiff and against defendant for \$5,000.00, the total amount of [172] said judgment being said sum of \$5,000.00 and \$—— costs and disbursements, and now in furtherance of justice and that right may be done, defendant presents the foregoing as its bill of exceptions in this cause and prays the same may be settled and allowed and filed and certified by the Judge as provided by law and the practice of this Honorable Court.

CANNON, FERRIS & SWAN,
BLACK & WERNETTE,

Attorneys for Defendant. [173]

*United States District Court for the District of
Idaho, Northern Division.*

SUSAN HARKINS,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corpora-
tion,

Defendant.

Admission of Service [of Bill of Exceptions, etc.].

Service of the within prepared Bill of Exceptions is hereby admitted this 13th day of January, 1914; and it is agreed that the same may be settled and certified as herein prepared without further notice.

ELDER & ELDER,
Attorneys for Plaintiff.

[Order Allowing Bill of Exceptions.]

Allowed as the defendant's Bill of Exceptions.

FRANK S. DIETRICH,

Judge.

January 24, 1914.

Filed January 26, 1914. A. L. Richardson, Clerk.

[174]

*In the District Court of the United States, for the
District of Idaho, Northern Division.*

SUSAN HARKINS,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corpora-
tion,

Defendant.

Petition for Writ of Error.

To the Honorable Judges of the United States Cir-
cuit Court of Appeals, Ninth Judicial Circuit.

Comes now the above-named defendant, Potlatch Lumber Company, a corporation, by its attorneys, and complains that in the records and proceedings had in said cause, and also in the rendition of the judgment in the above-entitled cause in said United States District Court for the District of Idaho, Northern Division, at the November term thereof, 1913, manifest error hath happened to the great damage of this defendant.

Your petitioner further respectfully shows that it

has this day filed herewith its Assignments of Error committed by the court below in said cause and intended to be urged by your petitioner and plaintiff in error in the prosecution of this, its suit in error.

WHEREFORE, the defendant prays for the allowance of a Writ of Error to the said Circuit Court and for an order fixing the amount of bond for a supersedeas in said case; and for such other orders and process as may cause the same to be corrected [175] by the said United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated this 13th day of January, 1914.

CANNON, FERRIS & SWAN and
BLACK & WERNETTE,

Attorneys for Defendant.

[Order Granting Petition for Writ of Error.]

Granted.

FRANK S. DIETRICH,

Judge.

January 24, 1914.

Due service of within Petition by receipt of a true copy thereof admitted this 13th day of Jan'y, 1914.

ROBT. H. ELDER,

ED. ELDER,

Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 24, 1914. A. L. Richardson, Clerk. [176]

*In the District Court of the United States, for the
District of Idaho, Northern Division.*

SUSAN HARKINS,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corpora-
tion,

Defendant.

**Order Allowing Writ of Error (and Fixing Amount
of Bond).**

The defendant Potlatch Lumber Company, a corporation, having this day filed its petition for a Writ of Error from the decision and judgment made and rendered herein, to the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, together with an Assignment of Errors within due time, and also praying that an order be made fixing the amount of security which the defendant shall give and furnish upon said Writ of Error, and that upon the giving of said security all further proceedings of said court be suspended and stayed until the determination of said Writ of Error by said United States Circuit Court of Appeals in and for the Ninth Judicial Circuit; and said petition having this day been duly allowed:

Now, therefore, it is ordered that upon the said defendant, Potlatch Lumber Company, filing with the Clerk of this court a good and sufficient bond in the sum of Six Thousand (\$6,000) Dollars, payable to Susan Harkins, plaintiff in the above-entitled

cause to the effect that if the said defendant Potlatch Lumber Company, and plaintiff in error shall prosecute the said Writ of Error to effect, and answer all damages and costs, if it fails to make its plea good, then the obligation [177] to be void, otherwise to remain in full force and effect, the said Bond to be approved by the Court; that all further proceedings in this suit be, and they are hereby suspended and stayed until the determination of said Writ of Error by the said United States Circuit Court of Appeals.

Dated this 24th day of January, 1914.

FRANK S. DIETRICH,

Judge.

[Endorsed]: Filed Jan. 26, 1914. A. L. Richardson, Clerk. [178]

*In the District Court of the United States, for the
District of Idaho, Northern Division.*

SUSAN HARKINS,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,

Defendant.

Assignments of Error.

Comes now the Potlatch Lumber Company, defendant in the above-entitled action, and makes and files the following assignments of error, upon which said defendant and plaintiff in error will rely in the

Circuit Court of Appeals of the United States for the Ninth Circuit, for relief from and a reversal of the judgment rendered in said cause in the court below, to wit:

I.

The Court erred in refusing to permit the defendant to ask the witness Harry Yountkin, and require him to answer whether or not the work was not being done at the time in question in the most practicable, customary and usual manner, to which ruling of the Court the defendant excepted and its exception was allowed.

II.

The Court erred in refusing to permit the defendant to ask the witness Harry Yountkin, and require him to answer whether or not, in his opinion, the use of the Marion loader was any more dangerous, under the circumstances, than if a slide had been used, to which ruling of the Court defendant excepted and its exception was allowed.

III.

The Court erred in refusing to permit the witness E. M. [179] Rogers to state whether or not the Marion steam loader was a reasonably safe machine for the purpose for which it was being used, to which ruling of the Court defendant excepted and its exception was allowed.

IV.

The Court erred in refusing to permit the witness E. M. Rogers to answer the following question propounded by defendant to said witness:

“Q. Mr. Rogers, the testimony in this case tends

to prove that the Potlatch Lumber Company, the defendant, was using a Marion steam loader, with a five hundred foot five-eighths inch cable, and that they were skidding logs, or hauling in logs from various directions, a distance of between three and four hundred feet with this machine, that the log started to roll down a hill, and struck a tree, knocking it down, a dead tree, knocking it down and killing the deceased. I will ask you to state whether or not, basing your answer upon your experience in the woods and your logging business, and your knowledge of the conditions, if that work was being done in a reasonably safe and customary manner.”

To which ruling of the Court defendant excepted and exception was allowed.

V.

The Court erred in refusing to permit the witness E. M. Rogers to answer the following question propounded by defendant to said witness.

“Q. Now, I will ask you to state whether or not the use of the machine, of the Marion steam loader, for hauling in these logs, under the circumstances that I have related, is or is not a reasonably safe machine for that purpose.”

To which ruling of the Court defendant excepted and its exception was allowed. [180]

VI.

The Court erred in refusing to permit the witness R. M. Hart to answer the following question propounded by said defendant to said witness:

“Q. I will ask you, Mr. Hart, whether or not

the Marion steam loader, or one of a similar character, is in general use throughout the country for the purpose of skidding logs within a radius of five or six hundred feet.”

To which ruling of the Court defendant excepted and its exception was allowed.

VII.

The Court erred in refusing to permit the witness R. M. Hart to answer the following question propounded by defendant to said witness:

“Q. I will ask you to state whether or not from your experience and observation, those machines are reasonably safe for the purpose of skidding in logs within a radius of five hundred feet.”

To which ruling of the Court defendant excepted and exception was allowed.

VIII.

The Court erred in refusing to permit the witness Thomas P. Jones to answer the following question propounded by said defendant to said witness:

“Q. Now, from your knowledge and experience of thirty years in the logging business, I will ask you to state whether or not the Marion steam loader is a reasonably safe machine for the purpose of skidding logs within a radius of five hundred feet from the track.”

To which ruling of the Court defendant excepted and its exception was allowed. [181]

IX.

The Court erred in refusing to permit the witness Norris P. Murphy to answer the following question propounded by defendant to said witness:

“Q. Now, Mr. Murphy, basing your answer and opinion upon your own experience and observation, covering a period of sixteen years, I will ask you to state whether or not the Marion loader is a reasonably safe machine for the purpose of skidding logs within a radius of five hundred feet.”

To which ruling of the Court defendant excepted and its exception was allowed.

X.

The Court erred in refusing to permit the witness Michael J. Ward to answer the following question propounded by defendant to said witness:

“Q. Now, basing your answer or your opinion upon your twenty-five or thirty years’ experience in the woods, in logging operations, and your knowledge and observation of machines similar to the Marion, I will ask you to state whether or not, in your opinion, those machines are reasonably safe for the purpose of skidding logs within a radius of five hundred feet.”

To which ruling of the Court defendant excepted and its exception was allowed.

XI.

The Court erred in refusing to grant defendant’s motion to direct a verdict for defendant made at the close of all the testimony in the case, which motion was based upon the ground that the plaintiff had failed to show any actionable negligence or any negligence whatever on the part of the defendant, and that the evidence shows conclusively that the death of deceased was due solely and alone to an accident which could not have [182] been foreseen

or anticipated, and that the evidence shows that a Marion steam loader was a reasonably safe machine for the purpose for which it was being used, and that it is a machine which is in general use throughout the country, and that the deceased in entering upon and remaining in the employment of the defendant in the work in which it was engaged, assumed all risks and dangers incident to the operation of the machine in the manner in which it was being operated at the time. To which ruling of the Court defendant excepted and its exception was allowed.

XII.

The Court erred in refusing to instruct the jury to return a verdict for the defendant for the reason and upon the grounds and each and all of them as stated in Assignment of Error XI, to which ruling of the Court defendant excepted and its exception was allowed.

XIII.

The Court erred in giving to the jury the following instruction:

“To explain, suppose the defendant had employed some other method by which certainly this accident could not have happened, and yet that method had been attended with danger of other accidents, that is, accidents of different kinds; as an illustration, if horses had been employed for hauling in these logs this particular accident of course would not have occurred; it couldn't have occurred in just this way. But the question still remains whether this method is more hazardous and unreasonably hazardous, more hazardous than

the method of skidding the logs by use of horses.

So, referring to the matter of using a signal device and a haul-back line, possibly this particular accident might [183] have been avoided, but you would not be justified in concluding that this is an improper method or a negligent method simply or merely from the fact that you may conclude that this accident could have been avoided. The question still remains for you to answer, namely, whether this method was more hazardous than the other referred to, namely, the haul-back."

To the giving of which instruction defendant excepted and its exception was allowed.

XIV.

The Court erred in entering judgment upon the verdict of the jury in favor of plaintiff for the reason and upon the grounds and each and all of them as stated in Assignment of Error No. XI, to the entering of which judgment defendant excepted and its exception was allowed.

The defendant duly excepted to the rulings of the Court in the matter of each of the above errors assigned, and hereby and now assigns each and every one of said rulings as error.

CANNON, FERRIS & SWAN,
BLACK & WERNETTE,

Attorneys for Defendant.

Due service of within Assignments of Error by

receipt of a true copy thereof admitted this 13th day of Jan'y, 1914.

ROBT. H. ELDER,
ED ELDER,
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 24, 1914. A. L. Richardson, Clerk. [184]

*In the District Court of the United States, for the
District of Idaho, Northern Division.*

SUSAN HARKINS,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, the Potlatch Lumber Company, a corporation, as principal and the Fidelity & Deposit Company of Maryland, a corporation, organized and existing under and by virtue of the laws of the State of Maryland, and authorized to do business as a surety company in the State of Idaho, are held and firmly bound unto Susan Harkins in the full and just sum of Six Thousand (\$6,000) Dollars, to be paid to the said Susan Harkins, her heirs, executors, administrators, legal representatives or assigns to which payment well and truly to be made we bind ourselves, our and each of our successors, heirs, executors, administrators and legal representatives, jointly and severally firmly by these presents.

Sealed with our seals and dated this 13th day of January, 1914.

WHEREAS, lately, in the District Court of the United States for the District of Idaho, Northern Division, in an action pending in this court between Susan Harkins as plaintiff, and the Potlatch Lumber Company, a corporation, as defendant, a judgment was rendered in favor of said plaintiff and against said defendant for the sum of Five Thousand (\$5000) Dollars, and costs of action, and said Potlatch Lumber Company has [185] obtained from said court a Writ of Error to reverse said judgment in the aforesaid action and a citation directed to the above-named plaintiff citing and admonishing her to appear in the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, in the State of California.

NOW, THEREFORE, the condition of the obligation is such that if the said Potlatch Lumber Company, plaintiff in error, shall prosecute its said Writ of Error to effect, and answer all damages and costs if it fails to make good its plea then this obligation shall be void; otherwise to remain in full force and effect.

POTLATCH LUMBER COMPANY.

By_____

Its Attorneys.

FIDELITY & DEPOSIT COMPANY OF
MARYLAND.

By W. L. BERRY,
Attorney in Fact.

[Seal]

Attest: HARRY E. RICH,
General Agent.

Coeur d'Alene, Idaho, 13th day of Jan'y, 1914.

O. W. CHAMBERLAIN,

Coeur d'Alene, Idaho.

Approved.

FRANK S. DIETRICH,

Judge.

January 24, 1914.

[Endorsed]: Filed Jan. 26, 1914. A. L. Richardson, Clerk. [186]

*In the District Court of the United States, for the
District of Idaho, Northern Division.*

SUSAN HARKINS,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Order Directing Transmission of Original Exhibits.

This cause came on duly and regularly for hearing on this 26th day of Jan., 1914, upon motion by appellant for an order directing the Clerk of this court to send to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, the original exhibits in the above-entitled cause, under his certificate that the same are such originals, the Court being fully advised in the premises, it is hereby ORDERED that the Clerk of this Court be, and he is hereby directed to send to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, under his certificate that the same are originals, the following exhibits:

1. Plaintiff's Exhibit No. 1.

Done in open court this 26th day of January, 1914.

FRANK S. DIETRICH,

Judge.

[Endorsed]: Filed Jan. 26, 1914. A. L. Richardson, Clerk. [187]

*In the District Court of the United States, for the
District of Idaho, Northern Division.*

SUSAN HARKINS,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Praecipe for Transcript.

To the Clerk of the Above-named Court:

You will please prepare transcript of the complete record in the above-entitled case to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, under the Writ of Error to be perfected to said court, and include in said transcript the following proceedings: Pleadings, papers, records and files, to wit:

Summons;

Complaint;

Answer;

Verdict;

Order of November 28th, 1913, Extending Time to
File Bill of Exceptions and Granting Stay of
Execution;

Judgment;

Petition for New Trial;
Order Denying Petition for New Trial;
Petition for Writ of Error;
Order Allowing Writ of Error and Fixing Amount
of Bond;
Assignments of Error;
Bond on Writ of Error;
Writ of Error;
Citation;
Order Directing Transmission of Original Exhibits;
—and any and all other record entries, pleadings,
proceedings, [188] papers and filings necessary
or proper to make a complete record upon said Writ
of Error in said cause, said transcript to be prepared
as required by law and the rules of this court and
the rules of the United States Circuit Court of Ap-
peals for the Ninth Judicial Circuit.

CANNON, FERRIS & SWAN,
Attorneys for Defendant.

[Endorsed]: Filed Jan. 28, 1914. A. L. Rich-
ardson, Clerk. [189]

*In the District Court of the United States, for the
District of Idaho, Northern Division.*

SUSAN HARKINS,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Defendant.

Writ of Error [Original].

The President of the United States, to the Honorable
Judges of the District Court of the United States
for the District of Idaho, Northern Division,
Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between the Potlatch Lumber Company, a corporation, plaintiff in error, and Susan Harkins, defendant in error, a manifest error hath happened to the great damage of the Potlatch Lumber Company, plaintiff in error, as by its complaint appears:

We being willing that error, if any hath *been*, a full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same in the city of [190] San Francisco, in the State of California, on the 23d day of February, 1914, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid be inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, the 24th day of January, in the year of our Lord One Thousand Nine Hundred and Fourteen.

[Seal] A. L. RICHARDSON,
Clerk of the United States District Court for the District of Idaho, Northern Division. [191]

[Endorsed]: No. 553. In the U. S. District Court, District of Idaho, Northern Division. Susan Harkins, Plaintiff, vs. Potlatch Lumber Company, Defendant. Writ of Error. Filed February 2d, 1914, A. L. Richardson, Clerk.

Due service of within Writ of Error by receipt of a true copy thereof admitted this 30th day of Jan.

ELDER & ELDER,
Attorneys for Plaintiff. [192]

In the District Court of the United States, for the District of Idaho, Northern Division.

SUSAN HARKINS,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corporation,

Defendant.

Citation on Writ of Error [Original].

United States of America,—ss.

The President of the United States to Susan Harkins and to Elder & Elder, Your Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the city of San Francisco, in the State of California, within thirty (30) days from the date of this writ, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Idaho, Northern Division, wherein the Potlatch Lumber Company, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the party in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 24th day of January, A. D. One Thousand Nine Hundred and Fourteen, and of the Independence of the United [193] States the One Hundred and Thirty-eighth.

FRANK S. DIETRICH,
United States District Judge. [194]

[Endorsed]: No. 553. In the U. S. District Court, District of Idaho, Northern Division. Susan Harkins, Plaintiff, vs. Potlatch Lumber Company, Defendant. Citation (on Writ of Error). Filed February 2d, 1914. A. L. Richardson, Clerk.

Due service of within citation by receipt of a true copy thereof admitted this 30th day of January.

ELDER & ELDER,
Attorneys for Plaintiff. [195]

*In the District Court of the United States, for the
District of Idaho, Northern Division.*

SUSAN HARKINS,

Plaintiff,

vs.

POTLATCH LUMBER COMPANY, a Corpora-
tion,

Defendant.

Certificate of Clerk U. S. District Court to Record.

United States of America,
District of Idaho,
State of Idaho,—ss.

I, A. L. Richardson, Clerk of the District Court of the United States, for the District of Idaho, do hereby certify that the foregoing pages numbered from 1 to 197, inclusive, together with the following exhibit, to wit, Plaintiff's Exhibit No. 1, constitute and are a true, complete and correct copy of the record, pleadings, testimony and all proceedings had in said action as the same remain on file and of record in said District Court, and that the same which I transmit constitute my return to the annexed Writ of Error lodged and filed in my office on the 2d day of February, 1914. I also annex and transmit the original citation in said action.

I further certify that the cost of preparing and certifying to said record amounts to the sum of \$115.50 and that the same has been paid in full by the defendant and plaintiff in error, The Potlatch Lumber Company.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at the city of [196] Boise, in said District of Idaho, in the Ninth Judicial Circuit, this 3d day of February, 1914, A. D. and the Independence of the United States of America, the One Hundred and Thirty-eighth.

[Seal]

A. L. RICHARDSON,

Clerk United States District Court, for the District of Idaho. [197]

[Endorsed]: No. 2374. United States Circuit Court of Appeals for the Ninth Circuit. Potlatch Lumber Company, a Corporation, Plaintiff in Error, vs. Susan Harkins, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Idaho, Northern Division.

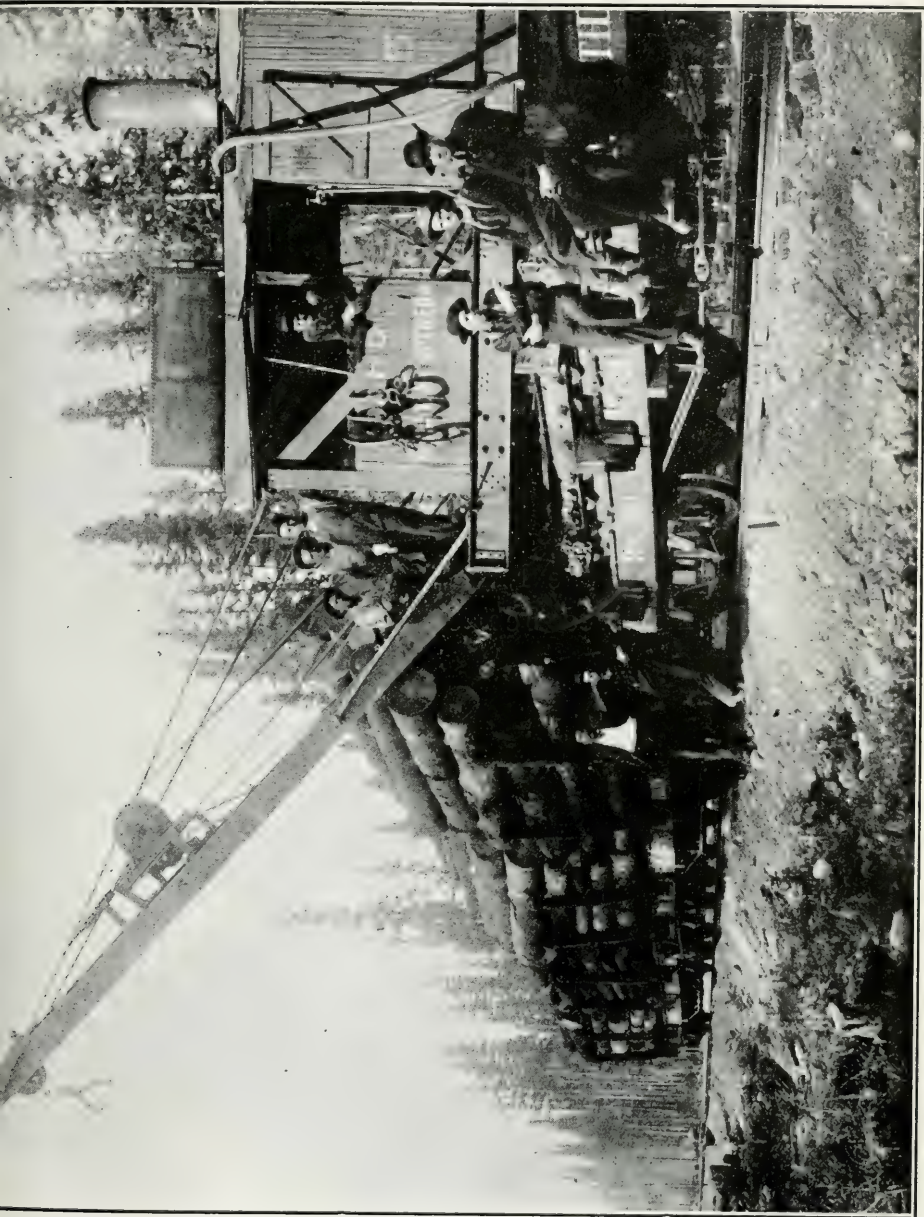
Received and filed February 6, 1914.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

Plaintiff's Exhibit No. 1.



[Endorsed]: Case No. 2374. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit 1. Received Feb. 6, 1914. F. D. Monckton, Clerk.

IN THE
United States
Circuit Court of Appeals

For the Ninth Circuit

POTLATCH LUMBER COMPANY,

a Corporation,

Plaintiff in Error,

vs.

SUSAN HARKINS,

Defendant in Error.

} No. 2374

BRIEF OF PLAINTIFF IN ERROR.

*Upon Writ of Error to the United States District
Court of the District of Idaho,
Northern Division.*

EDWARD J. CANNON,

GEORGE M. FERRIS,

CHARLES E. SWAN,

Attorneys for Plaintiff in Error.

STATEMENT OF THE CASE.

This action was commenced by the defendant in error to recover damages on account of the death of her husband, Harry Harkins, who was killed while employed by plaintiff in error skidding logs in the woods near Bovill, Idaho. The trial below resulted in a verdict in favor of defendant in error for \$5000.00 and costs. There is practically no dispute as to the facts regarding the accident and the only negligence charged in the complaint is that the Marion Steam Loader, which plaintiff in error was using for skidding logs, was not suitable or adapted to be used as a skidding machine.

At the time of the accident the crew, of which deceased was a member, was engaged in skidding logs with a Marion Steam Loader a distance of three hundred or four hundred feet (31). The men, including deceased, had pulled a cable, with which the logs were hauled in, out about three or four hundred feet where the cable was hooked onto a log (42). The deceased, however, had gone out only a short distance and, when last seen, prior to the accident, was standing on a log about fifty or sixty feet to one side and about half way out to the end of the cable, where he had been for two or

three minutes before the engine started to pull in the log (32-36-37-43). He had no duty to perform at this point and there seems to be no reason for his being there (32-33). Sometimes the men were arranged along between the engine and the end of the cable for the purpose of giving signals but, at the time of the accident, this was not done as all the men were in plain view of the engineer and the signals could be seen by him when given (43-61). After the cable had been pulled out by the men, the log was hooked on and the engineer given a signal to haul it in (32). As this particular log was being hauled in it struck against a tree knocking it down and the tree struck Harkins, killing him (32-37-38). Before starting to haul in the log the engineer looked over to where he had last seen the deceased but he was not in sight, having disappeared from view in the brush (44). The men had been doing the same kind of work in the same manner and with the same machine for two weeks or more before the accident, during all of which time, the deceased had been assisting them and he had also been employed in the same crew for a period of two months or longer (41-42).

It is conceded that the machine was in perfect

condition and entirely free from defects; that the accident was not due to the carelessness or negligence of any of the employees of the plaintiff in error and the defendant in error seeks to recover upon the sole and only ground that a Marion Steam Loader was not a proper machine with which to skid logs, in that it was not equipped with a haul back line or signal cord. The only evidence tending to show that the Marion Steam Loader was not a suitable machine for skidding logs or not in general use for such purpose is that several witnesses testified they had never seen them used for skidding logs for a greater distance than seventy-five feet (35-59-90-95-100). On the other hand the testimony shows conclusively that the Marion Steam Loader or other machines of a similar character are in general use all over the country for the purpose of skidding logs within a radius of five hundred feet or less (77-125-126-130-135-139-144-145-146-154-155-156- 159 - 165), and that it is neither customary nor practicable to equip such machines with haul back lines for skidding logs within that radius (79-128-135-136-147-156-157-160-166).

SPECIFICATIONS OF ERROR.

I.

The Court erred in refusing to permit witness Harry Younkins to answer the question propounded to him by plaintiff in error upon cross examination as to whether the work was not being done, at the time in question, in the most practicable, customary and usual manner (81), upon the ground that said question was leading, to which ruling of the Court plaintiff in error excepted and exception was allowed.

II.

The Court erred in refusing to permit the witness Harry Younkins to answer the question propounded to him by plaintiff in error upon cross examination as to whether or not the use of the Marion Steam Loader was any more dangerous than if a slide had been used (85), upon the ground that said question was leading, to which ruling of the Court plaintiff in error excepted and exception was allowed.

III.

The Court erred in refusing to permit the witness E. M. Rogers to state whether or not the

Marion Steam Loader was a reasonably safe machine for the purposes for which it was being used (126), to which ruling of the Court plaintiff in error excepted and exception was allowed.

IV.

The Court erred in refusing to permit the witness E. M. Rogers to state whether or not the work was being done in a reasonably safe and customary manner at the time of the accident (126), it having been shown that said witness was an experienced man in that kind of work and had full knowledge of the dangers and hazards thereof, to which ruling of the Court plaintiff in error excepted and exception was allowed.

V.

The Court erred in refusing to permit the witness E. M. Rogers to state whether or not the Marion Steam Loader for hauling logs in under the circumstances related is or is not a reasonably safe machine for that purpose (128), it having been shown that said witness was an experienced man in that kind of work and had full knowledge of the hazards and dangers thereof, to which ruling of the Court plaintiff in error excepted and exception was allowed.

VI.

The Court erred in refusing to permit the witness R. M. Hart to state whether or not the Marion Steam Loader or machines of similar character was in general use throughout the country for the purpose of skidding logs within a radius of five hundred or six hundred feet (139), it having been shown that said witness had full knowledge of the subject and was qualified to testify relative thereto, to which ruling of the Court plaintiff in error excepted, and exception was allowed.

VII.

The Court erred in refusing to permit the witness R. M. Hart to state whether or not the Marion Steam Loader was a reasonably safe machine for the purpose of skidding logs within a radius of five hundred feet (141), it having been shown that said witness was an experienced man in that class of work and had full knowledge of the dangers and hazards relative thereto, to which ruling of the Court the plaintiff in error excepted and exception was allowed.

VIII.

The Court erred in refusing to permit the wit-

ness T. P. Jones to state whether or not the Marion Steam Loader was a reasonably safe machine for the purpose of skidding logs within a radius of five hundred feet (149), it having been shown that said witness had thirty years' experience in that kind of work, and was qualified to testify with reference thereto, to which ruling of the Court the plaintiff in error excepted and exception was allowed.

IX.

The Court erred in refusing to permit the witness Norris B. Murphy to state whether or not the Marion Steam Loader was a reasonably safe machine for the purpose of skidding logs within a radius of five hundred feet (160), it having been shown that said witness was an experienced man in that kind of work and had full knowledge of the hazards and dangers relative thereto, to which ruling of the Court plaintiff in error excepted, and exception was allowed.

X.

The Court erred in refusing to permit the witness Michael J. Ward to state whether or not, in his opinion, the Marion Steam Loader was a reasonably safe machine for the purpose of skidding

logs within a radius of five hundred feet (167), it having been shown that said witness had had an experience of twenty-five or thirty years in that class of work and was thoroughly familiar with the hazards and dangers relative thereto, to which ruling of the Court plaintiff in error excepted and exception was allowed.

XI.

The Court erred in refusing to grant plaintiff in error's motion for a directed verdict in its favor made at the close of all the testimony in the case, which motion was based upon the ground that defendant in error had failed to show any actionable negligence whatsoever on the part of plaintiff in error and that the evidence showed conclusively that the death of deceased was due solely and alone to an accident which could not have been foreseen or anticipated, and that the evidence showed that the Marion Steam Loader was a reasonably safe machine for the purpose for which it was being used and that it is a machine which is in general use throughout the country, and that the deceased, in entering upon and remaining in the employ of the plaintiff in error in the work in which he was engaged,

assumed all risks and dangers incident to the operation of said machine in the manner in which it was being operated at the time of the accident (171), to which ruling of the Court plaintiff in error excepted and exception was allowed.

XII.

The court erred in refusing to instruct the jury to return a verdict for the defendant, for the reason and upon the grounds, and each and all of them, as stated in specification No. XI, to which ruling of the Court plaintiff in error excepted and exception was allowed.

XIII.

The Court erred in giving the jury the following instruction:

“To explain, suppose the defendant employed some other method by which certainly this accident could not have happened, and yet that method had been attended with danger of other accidents, that is, accidents of different kinds; as an illustration, if horses had been employed for hauling in these logs this particular accident of course, would not have occurred; it wouldn't have occurred in just this way. But the question still remains whether this method is more hazardous and unreasonably hazardous, more hazardous

than the method of skidding the logs by use of horses.

So, referring to the matter of using a signal device and a haul back line, possibly this particular accident might have been avoided, but you would not be justified in concluding that this is an improper method or a negligent method simply or merely from the fact that you may conclude that this accident could have been avoided. The question still remains for you to answer, namely, whether this method was more hazardous than the other referred to, namely, the haul back" (178).

To the giving of which instruction plaintiff in error excepted and exception was allowed.

XIV.

The Court erred in entering judgment upon the verdict of the jury in favor of the defendant in error, for the reasons and upon the grounds, and each and all of them stated in Specification of Error No. XI., to which entering of judgment plaintiff in error excepted and exception was allowed.

ARGUMENT AND AUTHORITIES.
SPECIFICATION OF ERRORS XI., XII.
AND XIII.

It is conceded that the Marion Steam Loader was in perfect condition and that the accident resulting in the death of deceased was not due to any negligence on the part of plaintiff in error, unless the use of the machine in question, for the purpose of skidding logs was in and of itself such actionable negligence as to entitle defendant in error to recover. The negligence relied upon by defendant in error is that the Marion Steam Loader was not equipped with a haul back line or signal cord, and for that reason was an unsafe and dangerous appliance to be used for the purpose of skidding logs. It appears in the evidence, however, that the men whose duty it was to give signals to the engineer, including deceased, were in plain sight of the engineer, and the absence of a signal cord was in no way the cause of the accident, as it was always customary for signals to be given by hand when this could be done. The only questions to be decided therefore are whether it was negligence for plaintiff in error to skid or drag logs a distance of three hundred or four hun-

dred feet without having a haul back line upon the machine, and if so, was such negligence the proximate cause of the death of deceased?

The only duty the master owes his servant is to furnish him with a reasonably safe place to work, reasonably safe tools and appliances, and competent fellow servants.

Having performed these duties, he is not responsible for accidents resulting in injury or death to his employees.

It must be conceded that an employer has an absolute right to conduct and carry on any lawful business in his own way, and use such methods and appliances as he sees fit, so long as those methods and appliances are reasonably safe, and the servant in entering and remaining in the master's employ assumes all risks and dangers necessarily incident to such use. Nor is it the duty of the master to furnish any particular kind of tools or appliances, and the mere fact that some other appliance or method may be safer than the ones adopted and used by the master does not render him liable in case of accident.

All the law requires is that the master use ordinary care in the selection of his machinery and

appliances, and he is not obliged to furnish the newest and best.

The evidence in the case shows conclusively that the machine in use and the method adopted by plaintiff in error at the time of the accident were the same as those adopted and used under similar circumstances and conditions all over the country, and common usage is the supreme test of due care in the selection of appliances and the adoption of methods for conducting one's business.

It is also shown by the undisputed testimony of the witnesses that it is not customary or usual to have a haul back line or signal cord upon any machine when used for skidding logs within a radius of five hundred or six hundred feet. How then can the plaintiff in error be said to have been guilty of negligence in using the machine in question at the time of the accident to deceased?

The only purpose of a haul back is to drag the cable back into the woods after a load of logs had been hauled in, and it was not used to prevent logs from swinging out of their regular course, nor could they be controlled to any extent by means of the haul back. None of the witnesses testified, that it was customary or usual to use a haul back

line on any kind of machine when it was used for skidding logs within a radius of four hundred or five hundred feet, and the only evidence tending to prove that the Marion Steam Loader was not a suitable and proper machine for that purpose is that two or three witnesses for defendant in error stated that they had never seen it used for skidding logs a greater distance than seventy-five feet. It appears, however, that it was operated in the same manner upon those occasions as when deceased was killed, and all the machines used for skidding logs within five hundred or six hundred feet were similar to the Marion, and in no instance was it shown that a haul back was used; in fact it conclusively appears that a haul back was never used under the circumstances and conditions existing at the time of the accident, and that its use was not practicable. The defendant in error is attempting to recover upon the theory that had the machine been equipped with a haul back line, the unfortunate accident would not have occurred, but there is no evidence to support this contention, and in any event, the mere fact that the use of some particular device or appliance might have prevented an injury is not sufficient to establish negligence on the part of the master for failure

to adopt such appliance or method.

As stated by Mr. Labatt, "evidence which merely tends to show that the particular accident which caused the injury might not have happened, if a particular precaution had been taken, goes for nothing in considering the question of legal liability on a charge of negligence." Labatt, Master & Servant, Vol. 3, Section 931.

"The recognition of the right of an employer to carry on his business in his own way, and to adopt any pattern or description of instrumentalities which he may prefer, involves the consequence that any risk which is due merely to the character of an instrumentality, and not to its abnormal condition or intrinsically defective quality, is to be deemed an ordinary risk of the employment." Labatt on Master & Servant, Vol. 3, Section 1171.

In this case the character of the machine is the only ground relied upon for a recovery, as it is conceded to have been free from defects, and its use by the plaintiff in error was one of the ordinary risks assumed by deceased.

In the case of *Hoffman vs. American Fdy. Co.*, 51 Pac. 386, the Supreme Court of the State of Washington uses the following language:

“The law is well settled that the master discharges his duty when he provides machinery that is of ordinary character and reasonably safe. He is not required to furnish the newest or the best. Employers are not insurers, and the law recognizes that absolute safety is unattainable. They are liable for the results of their negligence and not for the dangers necessarily connected with the service. The risks incident to the employment are assumed by the person accepting such employment; and in the absence of statutory provision prescribing the kind or character of machinery to be used, or regulating the manner of its use, an employer who uses machinery which is in common and ordinary use in the line of business in which he is engaged cannot be held liable for an accident which might have been avoided by the use of different machinery.”

In *Engine Works v. Nuttall*, 13 Atl. 65, the Court say:

“The test is general use. Tried by this test, the saw of the defendant is such a one as the company had a right to use, because it is such as is commonly used by mill owners.”

And again in *Titus v. Railroad Company*, 20 Atl. 517, the Court uses the following language:

“No man is held by law to a higher degree of skill than the fair average of his profes-

sion or trade, and the standard of due care is the conduct of the average, prudent man. The test of negligence in employers is the same; and, however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way, commonly adopted by those in the same business, is a negligent way, for which liability will be imposed."

In the case of *Harley v. Buffalo Car. Mfg. Co.*, 36 N. E. (N. Y.) 813, the Court say:

"It must always be true that, where several appliances are in use, each of which is regarded by men of skill and experience as safe and proper, the master cannot be made liable for an injury to one of his servants if in selecting the particular appliance he takes what, according to his judgment, is the best or most suitable, guided by his experience and observation, and those of the skilled men in his employment. Upon the evidence in this case, it cannot even be determined that the managers of the defendant erred in their judgment in the selection of this kind of fastener. But if there was an error in judgment, it was not such as to constitute that degree of negligence and want of prudence which, under the rules of law above cited, can impose liability for such an accident as this."

In the case of *Ross v. Pearson Cordage Company*, 41 N. E. (Mass.) 284, the Court say:

“The machine was in the same condition at the time of the accident as it was when the plaintiff entered the defendant’s employ. There is no evidence that there was any defect in it, or that it differed from similar machines in use elsewhere. The mere fact that certain contrivances, if on the machine, might have prevented its starting, is not enough to charge the defendant; and we see no evidence to warrant the jury in finding that there was any breach of duty on the part of the defendant.”

The only possible ground upon which defendant in error can recover is that plaintiff in error was negligent because of having departed from custom by adopting a different method and using a machine not in general use for doing the work in which it was engaged at the time of the accident. It has been shown, however, that the Marion Steam Loader was in general use for the skidding of logs within a distance of five hundred feet, but, in any event, a mere departure from custom is not negligence. In the case of *American Locomotive Works vs. White*, 205 Fed. Rep. 260, the Circuit Court of Appeals for the Third Circuit discusses

this question at length, and at page 265 the Court say:

“The part that usage should play in controversies like the case before us has been much debated, and the decisions thereon have by no means been uniform. Confining ourselves for the present to the point new in issue, we state as our opinion that a servant may be permitted to prove the common usage of the business, when he charges the master with negligence in doing some act that departs from the usage; but the proof should be accompanied by evidence that the departure complained of has increased the danger. The increased danger may appear from the circumstances of the act in controversy, or (in a proper case) it may be shown by direct testimony of witnesses. The question in most issues of negligence is whether the defendant has used ordinary care under the particular circumstances. To establish his case plaintiff must prove the circumstances; and if negligence appear *prima facie* the defendant may then reply to the charge by evidence that his conduct has accorded with the common usage of the business. Undoubtedly the plaintiff may offer evidence in rebuttal to show that the defendant's conduct was not in accord with usage, and if he may do this in rebuttal we cannot say that the trial court does not have the discretion to permit him to offer the evi-

dence in chief. But neither in chief nor in rebuttal should a plaintiff be permitted to recover on mere proof of departure from custom, for such departure may be in the direction of greater safety as readily as in the direction of greater danger; he should always be required to prove further, somewhere in his case, that the departure has resulted in greater danger. The general subject of usage as a test of due care is carefully discussed in chapter 6 of 1 Labatt, Master & Servant (1904), page 109, and cases in great number are referred to in the notes."

The testimony in this case is undisputed that in skidding logs within a radius of five or six hundred feet, no matter what machine was used, it was not customary to use a haul back line; and that the work was performed all over the country in the same manner as at time of accident to deceased.

In view of these facts, even conceding that the use of the Marion was a departure from custom, such departure did not result in greater danger to the servant and therefore the master cannot be held guilty of negligence.

As stated by the Circuit Court of Appeals for the Eighth Circuit, in the case of *H. D. Williams Cooperage Co. vs. Headrick*, 159 Fed. 680:

“The master is not required to furnish the best, the safest, or the newest methods of operation, nor to adopt extraordinary or unusual safeguards against risks or dangers. The limit of his duty here is to exercise ordinary care to supply reasonably safe places, appliances and methods. The test of the discharge of his duty is the exercise of ordinary care to supply such places, appliances and methods as persons of ordinary intelligence and prudence commonly furnish in like circumstances.”

It also appears that deceased was a man of at least ordinary intelligence, had many years' experience in the woods in various capacities, and had worked with the Marion Loader skidding logs for two or three weeks or longer, during all of which time the work had been performed in the same manner as when the accident occurred. Under these circumstances, he must be held to have assumed all the risks and dangers incident to the work in which he was engaged and the manner of its performance.

Again it appears from the undisputed testimony that he had himself chosen the particular place where he was when killed, that he had no duties whatever to perform at that point, and there was no reason for the master to anticipate any danger

to him by the use of the Marion Loader for skidding purposes.

SPECIFICATION OF ERROR NO. I.

The negligence charged in the complaint is that the Marion Steam Loader, used by plaintiff in error, at time of accident, is not a suitable or proper machine for the purpose of skidding logs, but was an unsafe and dangerous appliance with which to perform work of that kind. It was therefore proper for plaintiff in error upon cross examination of defendant in error's witness Harry Younkin to ask him if they were not doing the work at such time in the most practicable, customary and usual manner under the circumstances, and the fact that the question was leading did not make it objectionable. The widest latitude is permitted in cross examination and the rules and principles of evidence do not prevent leading questions upon cross examination merely because the witness may be related to one of the parties and in the employ of the other. Furthermore, opposing counsel made no objection to the question and the trial Court abused its discretionary power in interrupting the examination of witness upon its own motion and preventing the question being

answered, as it was not called upon to decide whether the evidence sought was admissible or not. The action of the Court in this respect was clearly prejudicial to the rights of plaintiff in error, whose burden was already sufficiently great in the trial of a death case before a jury. Witness Younkin was an experienced woodsman, thoroughly familiar with the risks and dangers incident to the use of the machine in question and plaintiff in error had an absolute right to elicit from him the information sought to be obtained by the question which the Court would not permit him to answer.

SPECIFICATION OF ERROR NO. II.

The plaintiff in error also asked the same witness on cross examination whether, in his opinion, the use of the Marion Loader was any more dangerous under the circumstances than the use of the "slide," which latter machine the witness had testified was a regular skidding machine and could have been used at the time of the accident. This question the Court refused to permit him to answer upon the ground that it was leading, and because of the relation of the witness to the parties, leading questions were not permissible even on cross examination.

We submit that this action of the Court constituted error, as the plaintiff in error was entitled to have the question answered, and the rules and principles of evidence do not prevent leading questions upon cross examination merely because the witness may bear some relation to the parties litigant. The question to which objection was sustained goes to the very gist of the action, that is, was the use of the Marion Loader attended with any greater danger than those customarily and generally used for the same purpose, and the witness, who was an expert in such matters, should have been permitted to answer.

SPECIFICATIONS OF ERROR NOS. III., IV., V., VI., VII., VIII., IX. AND X.

These specifications all involve the same principle and may be discussed together.

As hereinbefore set forth, the only negligence alleged on the part of the plaintiff in error was in using a machine that was unsuitable and not adapted for skidding logs and which was dangerous and unsafe for that purpose. It became necessary therefore that plaintiff in error show, in order to disprove negligence, that the machine

in question and the method adopted were reasonably safe, and this could be done only by witnesses with knowledge and experience in work of the same character and who were competent and qualified by reason thereof to testify upon that point. It is claimed that this was the sole province of the jury, and not a subject of expert testimony, but we submit that this theory is erroneous. How can a jury of twelve men be presumed to know whether a machine or a particular method of performing work is safe or unsafe when they have had no experience in that class of work, and no knowledge of the machine in question? In order for the Court or jury to form an intelligent opinion upon the subject, the evidence of men familiar with the dangers and hazards of work of that kind, and whose experience qualifies them to testify regarding the matter, is absolutely essential, as it is not a matter of common knowledge which a jury is qualified to pass upon.

The question of whether the method adopted and machine used at the time of the accident was one requiring skill and knowledge not possessed by the ordinary man.

Smith v. Dow, 43 Wash. 407; 86 Pac. 555.

Wabash Screen Door Co. v. Black, 126 Fed. 721.

Knauf vs. Dover Lbr. Co., 20 Idaho, 773; 120 Pac. 157.

Hayes vs. Southern Pac., 53 Pac. 1001.

Murphy vs. P. T. & T. Co., 68 Wash. 650; 124 Pac. 114.

Luper v. Henry, 59 Wash. 33; 109 Pac. 208.

See also:

Indiana Bituminous Coal Co. v. Buffey, 62 N. E. 279.

Bonebrake vs. Board of Commissioners, 40 N. E. 141.

Storrie vs. Grand Trunk Elevator Co., 96 N. W. 569.

Fitts vs. Cream City R. Co., 18 N. W. 186.

Cincin. & Zanesville R. Co. v. Smith, 10 Am. Rep. 729.

In *Smith vs. Dow*, 43 Wash. 410, 86 Pac. 555, the Court say:

“Appellant next alleges error of the court in permitting certain witnesses to testify as to what they considered the proper way to tie the packages. They had previously expressed the opinion that the method used by

appellant was unsafe and not the usual method. These witnesses were qualified as experts. As such they were competent to give an opinion upon the subject."

The case of *Wabash Screen Door Co. vs. Black*, 126 Fed. 721, is also in point, and at page 727, the Court say:

"5. The same witness, Ward, who had some twelve years' experience about machinery, and had been employed in six or seven factories, was examined as an expert, and asked to state whether a 42-inch pulley made of wood with only two arms was safe or unsafe. This question was objected to on the ground that it was one for the jury to answer. Now it is insisted that it was too meager and did not identify sufficiently the pulley in controversy. But the question was not objectionable on the ground given the trial judge. If the present objection had been made then, the trial judge might have required the question to be made more specific. It is too late to make the objection now. Ward's competency as an expert is objected to, but we are not disposed to disturb the ruling of the trial judge on that point, and as to the weight to be given Ward's testimony, that was a question for the jury. *Union Insurance Co. v. Smith*, 124 U. S. 400, 423; 8 Sup. Ct. 534; 31 L. Ed. 497, and cases cited.

Error is also assigned for the admission of

the testimony of Weatherford, one of the experts, with respect to whether a pulley similar to that which burst was safe or not. The question was first objected to on the ground that it did not state the kind or material that the saw running by the pulley was cutting. This omission was supplied, and then the witness, answering the question which described in some detail the pulley, stated he did not consider it safe. It is now urged that by expressing this opinion the witness invaded the province of the jury, and we are referred to the case of *Bruce v. Beall*, 99 Tenn. 303, 41 S. W. 445. In that case the company was sued for the breaking of an elevator cable which had been in use for some 13 years. An expert testified that the life of such a cable is limited to six or seven years, and was then permitted, over the objection of the defendant, to state that in his opinion it would not be prudent to keep such a cable running for more than 6 or 7 years. The Supreme Court of Tennessee pointed out in the case of *Camp v. Ristine*, 101 Tenn. 534, 47 S. W. 1098, that the answer to the first question was entirely competent. It was proper for the expert to testify that the life of the cable was limited to 6 or 7 years, but he was improperly allowed to go on and usurp the function of the jury by saying it was not prudent—that is, it was negligent—for the company to use the cable for more than 6 or 7 years. That was the very question the jury was to decide. Now,

in the present case, Weatherford was not asked to testify whether it was prudent for the company to use the pulley. It was for the jury to decide whether the company was negligent or not in using the pulley. But it was necessary for the jury to know whether the pulley used was safe or unsafe, suitable or defective. If it was safe it was not defective, and if it was defective it was not safe. Weatherford was permitted to testify that the pulley described to him in the question would, in his opinion, be unsafe—that is, defective—and he gave in detail the reasons for his opinion, pointing out wherein such a pulley would be inherently weak and liable to fly to pieces. Now that was peculiarly a question for an expert. The strength of materials when combined in a piece of machinery, operating in a certain way, is a thing not open to common knowledge, but requires special skill, experience, and investigation to estimate. Weatherford had qualified as an expert, and what he said came properly within the range of expert testimony.”

This is the very question to be determined in the present case, and no one who has not had the actual experience in similar work can intelligently determine whether or not a certain method or machine is safe or unsafe.

In the case of *Knauf v. Dover Lumber Co.*, 20

Idaho, 773; 120 Pac. 157, the Supreme Court of Idaho held that expert testimony was admissible to prove a proper method and whether the construction of a slasher was safe or dangerous. The Court say:

“A number of questions similar to the above were asked and the witnesses were called upon to give opinions as to whether the hole where the respondent received the injury was of the character usually provided for slasher chains going over the floors and through holes in the floors in saw mills where the same were used, and whether the construction was proper and necessary. Counsel for appellant argue that the subject of inquiry was not of an expert character, and that the questions called for an opinion of the witness upon an issue which should have been left to, and was to be determined by the jury. Most of these questions go to matters which relate to common knowledge of the probability of the injury in case one stepped into a hole the size of the one where the accident occurred, but these questions are intermingled with questions which relate to whether the same was constructed in the manner in which other slashers which were known to be safe and not of a dangerous character were constructed usually. It is a well-known principle of law that expert evidence as to matters of common knowledge can in no way injure anyone, and it is not reversible

error to admit such evidence when offered.

* * *

“In the present case the question as to the negligence of defendant in permitting the hole to be in the condition it was, and permitting it to so remain, was for the jury to determine, and the jury might be very much aided in determining this question by the evidence showing that it was maintained in such a manner as to show negligence on the part of the appellant, or where the facts were such as to require of the respondent that he should expect and look for defects in the construction, condition and operation of the chain through this hole. This would not necessarily be a matter of common knowledge, but would be the statements and experience of men familiar with the subject and might be a very great aid to the jury, notwithstanding the fact that the very question which the witness expresses an opinion upon is the question which the jury must pass upon; and in such cases the fact that the witness expresses an opinion upon a matter of common knowledge in giving his testimony is not reversible error.”

The case of *Hayes vs. Southern Pacific*, 53 Pac. 1001, is directly in point. In that case the Supreme Court of Utah held expert testimony proper in cases of this kind and state:

“The first assignment of error which we

will consider relates to the admission of evidence. The Court permitted the witness Fitzgerald, over the objection of counsel for the plaintiff, to answer the following question: 'From your experience as a railroad engineer and your experience as a civil engineer, please state whether those sheds were carefully and properly built for the purposes for which they were erected?' Counsel for appellant insist that this action of the Court was erroneous, because, as they maintain, it was calling for the opinion of the witness on a question that the jury was to determine. No objection seems to have been interposed on the ground that the witness was not an expert, and therefore it may be assumed that he was competent to give expert testimony. The general rule is that the witness must testify to facts, not conclusions. To this rule, however, there are exceptions, and we think this question falls within the exceptions. The contention of the appellant at the trial was that the coal sheds were negligently constructed. This was controverted by the respondent and thus one of the main issues was whether they were properly erected for the purpose for which they were intended. Now, it is apparent from the evidence that these sheds are peculiar and more or less complicated structures,—results of mechanical skill—and appear to be necessary for, and used exclusively in, the business of railroading. Thus, the very nature and the use of the structure precludes the idea

that the average layman is competent to judge of their proper or improper construction. It was therefore permissible to resort to the opinion of a person possessed of such requisite mechanical skill and experience as enabled him to form a correct judgment as to whether or not the sheds were carefully and properly constructed. The building of such sheds for the business of railroading is not a subject of general knowledge, but it depends so far upon skill in and knowledge of the mechanic arts, outside the knowledge and experience of ordinary jurors, as to render the opinions of those who are competent, from special training in the art of construction, and experience, to form them, admissible. This is so because of the difficulty of placing before jurors unskilled in such matters a state of facts which would enable them to draw correct conclusions without the aid of such opinions. And such opinions are not in all cases confined to experts."

In the *Murphy* case an experienced lineman was permitted to testify as to how a telephone pole should have been guyed in order to make it safe, and the Supreme Court of Washington held that the question was a subject for the opinion of an expert.

In the case of *Luper vs. Henry*, 109 Pac. 208, witnesses were permitted to state that a certain platform was not properly or safely constructed,

and the Supreme Court of Washington held that it was a proper subject for expert testimony.

The ground relied upon for recovery in this case being that the Marion Steam Loader was an unsafe and dangerous machine for the purpose of skidding logs, the question of whether it was in fact a reasonably safe machine for that purpose was peculiarly a subject for expert testimony, as no one, other than men having long experience in the use of such machines, and thoroughly familiar with the kind of work being performed by it, could form an intelligent opinion as to its being safe or dangerous. It was, therefore, prejudicial error for the trial Court to refuse to permit the expert witnesses to testify upon this point.

SPECIFICATION OF ERROR NO. XIII.

In giving the instruction complained of, the trial Court in effect charged the jury that if the use of the Marion Steam Loader, without a haul back, was more hazardous than if the haul back had been used, they should find for the plaintiff. This instruction does not correctly state the law and the giving of it was prejudicial to plaintiff in error and constitutes reversible error. All the law requires is that the master furnish reasonably safe

machinery and appliances and the fact that one kind of appliance, or a certain method of performing work is more dangerous and hazardous than another does not make the master liable. Under the instruction given, the jury were permitted to find against the plaintiff in error if in their opinion, the accident might have been avoided by the use of a haul back, regardless of the fact that the testimony is undisputed that it is not customary anywhere to use a haul back in skidding logs a distance of five hundred or six hundred feet or less. The law imposes no such burden upon employers of labor. To do so would be to make the master an insurer.

CONCLUSION.

We submit that deceased assumed the risk of the operation of the Marion Steam Loader in the manner in which it was being operated at the time of his death; that said machine was in general use all over the country for skidding logs a distance of five hundred or six hundred feet; and that it was not negligence on the part of plaintiff in error to use it for such purpose; that it was not customary or practicable to use a haul back under the circumstances and conditions existing at time

of accident, and that the absence of a haul back was not the proximate cause of deceased's death; that the Court erred in ruling out the evidence as set forth in Specification of Errors I. to X. inclusive; and that the instruction of the Court as set forth in Specification of Error XIII. was erroneous and prejudicial to the rights of plaintiff in error. For all of these reasons we ask that the judgment be reversed and a new trial granted.

Respectfully submitted,

EDWARD J. CANNON,

GEORGE M. FERRIS,

CHARLES E. SWAN,

Attorneys for Plaintiff in Error.

NO 2374.

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit.

POTLATCH LUMBER COMPANY, a Coporation,
Plaintiff in Error,

VS.

SUSAN HARKINS,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT OF THE DISTRICT OF
IDAHO, NORTHERN DIVISION.

ROBT. H. ELDER,

ED. S. ELDER,

Attorneys for the Defendant in Error.

IN THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.

POTLATCH LUMBER COMPANY, a Coporation,
Plaintiff in Error,

vs.

SUSAN HARKINS,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

By this appeal the Potlatch Lumber Company is seeking to have reviewd a verdict and judgment, rendered and made in the above entitled cause in the District Court of the United States for the District of Idaho, Northern Division, at Coeur d'Alene, Kootenai County, State of Idaho, during the November term of said court in the year 1913.

Harry Harkins, the husband of the defendant, was employed by the Potlatch Lumber Company as top loader at or near Bovill, in Latah County, Idaho. While engaged at said work he was instructed by the foreman and superintendent of the company to leave his work as top loader and assist in skidding logs with a Marion Steam Loader, and was instruct-

ed and required to assist in pulling out the cable that was used for the purpose of hauling in and skidding the logs; and to station himself at a point visible to the engineer for the purpose of giving signals. While thus engaged under the direction of the foreman and superintendent of the company, Harry Harkins received injuries which resulted in his death.

The defendant in error, Susan Harkins, instituted this action, claiming damages for the death of her husband. The jury returned a verdict on the 22nd day of November, 1913, in favor of the plaintiff in the sum of five thousand dollars (\$5,000.00), and judgment thereon was entered by the court on the 22nd day of November, 1913.

The evidence discloses the fact that the company was using a Marion Steam Loader for the purpose of skidding logs. The machine was not equipped with signal device or haul-back line, and is not customarily or generally used for the purpose of skidding logs, but is essentially a loading machine, and used for the purpose of loading logs that have been previously skidded along the track of a railroad.

The evidence further discloses the fact that if the machine had been equipped with a haul-back line and signal device, the engineer would have had abso-

lute control over the line, and the logs attached to it. That the machine which is usually and generally used for the purpose of skidding logs is equipped with haul-back line and signal device, and when so equipped there is no occasion for stationing men along the line for the purpose of giving signals.

ARGUMENT AND AUTHORITIES.

The first specification of error urged by the plaintiff in error is the refusal of the court to allow the witness, Harry Younkins, to answer the following question:

“As a matter of fact, they were doing that work there that morning in the most proper and customary and usual manner under the circumstances, isn't that true?”

Harry Younkins was the foreman and managing agent of the company in charge of the work, and was related by marriage to the defendant in error. The court, in his ruling, stated that owing to the peculiar relation that this witness bore to each of the parties, he would permit leading questions only to a limited extent.

The court was clearly justified in his ruling for the reason that the information sought is clearly a mixed question of fact and law, and was not proper inquiry to make of the witness.

The opinion of this witness could not be of assistance to the jury in arriving at the fact as to whether or not this company was negligent in operating the Marion Steam Loader as a skidding machine.

The plaintiff in error complains of the ruling of the court in sustaining the objection propounded to several of its witnesses as to whether or not the machine, known as the Marion Steam Loader was a reasonably safe machine for the purpose of skidding logs within a radius of five hundred feet.

We submit that this was not a proper question--the witness should not be permitted to express his opinion upon the very question to be determined by the jury under the instructions of the court. If the witness is allowed to testify that the Marion Steam Loader is a safe machine for the purpose for which it was being used, it will be seen that what he says is the full equivalent of the opinion that the defendant was not guilty of negligence. It is in substance the same as if he had testified that the plaintiff in error had used due care in selecting the appliance for doing this work. If this is not a substantial declaration by the witness that the defendant was not negligent, it is barely one degree removed from it.

Had the witness been allowed to answer these questions sought by the plaintiff in error, in our judgment, it would be permitting the witness to invade the province of the jury. A witness should state facts, the court should declare and explain the law, and the jury should find the facts. The functions of the three within their several spheres are clearly defined, and should always be kept separate and distinct.

Whether the Marion Steam Loader was so constructed that its operation was safe to the defendant's employees is the very question upon which the parties are at issue, and which the jury were empaneled to decide. The witness's opinion on that question is objectionable, and we submit the court's action in sustaining the objection was correct.

The admission or rejection of expert testimony in a given case must rest largely in the discretion of the trial judge.

17 Cyc. p. 57, state the rule:

"The issue of negligence can in most cases well be determined by the judgment of the jury, and the inference, conclusion, or judgment of the witness is rejected. This rule has been applied for example to questions of whether a bridge, road, road-way, side-walk, track, or other place, machinery, mechanical appliances,

rate of speed, situation, or other things, or collection or combination of things, is safe or dangerous."

Thompson on the Law of Negligence in Vol. VI, p. 685, lays down the following rule:

"It may be stated as a general rule that if the facts of any particular inquiry can be so placed before the jury, that, as men of ordinary intelligence, they can fully understand the matter and draw the proper inference and conclusions therefrom, the opinions and conclusions of a witness, whether an expert or non-expert, should not be received."

Richardson v. Eureka, 96 Cal. 443; 31 Pac. Rep. 458.

Kauffman v. Maier, 94 Cal. 269; 18 L. A. R. 124.

Shafter v. Evans, 53 Cal. 32.

Henion v. N. Y. etc. R. Co., 69 Fed. Rep. 903; 51 U. S. App. 157; 25 C. C. A. 223.

Pullman Palace Car Co. v. Harkins, 55 Fed. Rep. 932.

Munger v. Waterloo, 83 Iowa 559; 49 N. W. Rep. 1028.

Langhammer v. Manchester, 99 Iowa 36; 64 N. W. Rep. 682.

Atchison etc. R. Co. v. Lawler, 40 Neb. 356; 58 N. W. Rep. 986.

Bergquist v. Chandler Iron Co. 49 Minn. 511: 52 N. W. Rep. 136.

Labatt, on Master and Servant, Vol. 4, §1579, lays down the following rule on page 4842:

“That the question whether a certain act or omission imported negligence under the given circumstances is not one which can be determined by expert testimony.”

Justice Nelson, of the United Circuit Court for the District of Minnesota, in passing on this question in the case of Seese v. Northern Pac. Ry Co., 39 Fed. p. 488, says:

“In such case expert testimony of a yard-master that the method of coupling adopted by plaintiff was careless, dangerous, and not the usual or best way of coupling, was properly excluded.

“The admission or rejection of expert testimony in a given case must rest largely in the discretion of the trial court, and where it is evidence that such testimony, if admitted, would tend to aid the jury in coming to a satisfactory conclusion upon the facts, such admission is not error.”

State v. Hendel (35 Pac. 836)—4. Idaho Rep. 88.

Judge Wallace of the Circuit Court of Appeals, Second Circuit, in the case of Henion v. New York, N. H. & H. R. Co., 79 Fed., 903, in passing on this question, says:

“Some of the testimony which was excluded, offered for the purpose of showing how the platforms of other railroad companies were generally constructed, was subsequently introduced by the plaintiff, and she was permitted to prove what was the width of the platforms in use on other railroads of approved construction. In as much as the platform in question was a temporary affair, it is difficult to see in what view any of of this evidence was material. But we think it was all incompetent on another ground. If the defendant failed to provide the deceased with a reasonably safe place for the work which was expected of him, it was because the platform was too narrow, and located too near the tracks; and whether, because of these features, it was a dangerous or a reasonably safe place, was a matter which could be determined by a jury without the aid of any comparison with other platforms, or of any expert testimony. When the facts can be placed before a jury, and they are of such a nature that juries generally are just as competent to form opinions in reference to them and draw inferences from them as witnesses, there is no occasion to resort to opinion evidence.”

Justice Temple, in the case of *Giraudi v. Elec. Imp. Co.*, 107 Cal. 120; 48 Am. Rep. 115, in passing on this question, says:

“The cases do undoubtedly hold that an expert cannot be asked whether a structure is a safe one, or whether certain methods are prudent, but all hold the facts may be elicited from the witness from which the conclusion inevitably follows. To illustrate: In *Bemis v. Central*

Vt. R. R. Co., 58 Vt. 636, an expert was held not allowed to testify 'that it was prudent to use a certain hoisting apparatus with less than three men, on a stone of two ton heft.' Yet the court said that there might have been shown 'the number of men required, danger in its use by a less number, its safety and adequacy when properly used,' and added that the jurors could as well decide for themselves. Of course the point had been as effectively decided by the expert as though the first question had been answered. The difference is largely one as to the form of the question, and, while I do not mean to say that it is immaterial, or that such an error may never be cause for reversal, I do think it should be so held here. The answer of the witness gave the facts in full and explained what methods would have been safe. All this information might have been obtained by proper questions. And then it is not very material here. The negligence of the defendant was fully proven by other evidence."

Justice Earl of the Court of Appeals of New York, in the case of Harley vs. Buffalo Car Mfg. Co., 36 N. E. 814, in passing on this question, says:

"We think these questions were objectionable. A sample of this belt fastener was produced before the jury, also a piece of the belt, showing how the fastener was used. Its size and method of use were apparent to the jury. It was competent for the plaintiff to prove the strain to which it would be subjected, its liability to break, and all the experienced persons who had used it, and thus all the facts could be placed before the jury from which they could determine whether or not it was suitable and a

safe belt fastener. It cannot be proper to have the issue determined by experts, however skilful and experienced they may be. The facts should be placed before the jury, and they should be left to determine whether the belt fastener was safe or otherwise."

Van Wyckler v. City of Brookly. 118 N. W. 424; 24 N. E. 179.

Roberts v. R. R. Co., 128 N. Y. 455; 28 N. E. 486.

Schneider v. R. R. Co., 133 N. Y. 583; 30 N. E. 752.

"In an action against the owners of a saw-mill for personal injuries sustained by an employee in getting his hand caught in a lath-saw, the guage of which he was attempting to change while in motion, expert evidence that the guage used on that saw was as safe as other guages used on other saws is inadmissable, when the jury have a model of the saw before them, and can see for themselves just how dangerous it is to operate, and how the danger compares with that incurred in the use of other saws concerning which testimony had been given."

Sprague v. Atlee, et al, 46 N. W. 756.

Justice Angellotti of the Supreme Court of California, 74 Pac. 311, in passing on the following question:

"I will ask you now if the machine, you

have described and diagramed with connection with the brake then in use, would be or is or was on that day a safe machine and appliance to hoist the weight that you have described from a shaft over 200 feet deep?" says:

"The plaintiff was entitled to show and did show by this witness facts upon which the court could decide as to whether the machinery was safe or not. As it is shown in Giraudi information desired from which a conclusion of safety flows is admissible; and the answer to such a question is often such that its admission would not be held cause for reversal, but under the authorities there were no errors in sustaining the objection."

Sappenfield vs. Main St. R. R. Co., 91 Cal. 48, 27 Pac. 590.

17 Cyc. 45, lays down the following rule:

"Although an inference or conclusion be in the main a mere statement of a fact, and therefore under ordinary circumstances not amenable to the rule excluding 'opinion evidence,' the parties may, by involving the fact within the distinctive field of the jury's operation, place it within the mischief of intruding upon the jury's province, against which the opinion evidence rule was intended to provide. To protect this right the court will exclude so far as possible the inference, or judgment of witnesses where they cover the final inference as to the existence of a fact in issue."

In Shafter vs. Evans, 53 Cal. 32, it was said:

"The ultimate fact of negligence in such a case is not one to be established by mere opinion

of witnesses called to testify. The evidence of experts is not admissable."

Justice Marshall of the Supreme Court of Wisconsin, in the case of *Hamann v. Milwaukee Bridge Co.*, 127 Wis. 550; 7 Am. & Eng. Ann., 458, in passing on this question, says:

"It is not competent to introduce expert evidence as to whether a particular manner of moving a machine was proper, where the jury, when put in possession of all the facts, can form as reliable opinion on the question as an expert could, and where the jury can be put in possession of such facts."

"The question as to the admissibility of opinion evidence lies in the field of competency, and the action of the trial court in admitting such evidence should not be disturbed on appeal except in case of a clear showing of error."

Hamann v. Mil. Bridge Co., 127 Wis. 550. 7 Am. & Eng. Ann. 459.

The court committed no error in refusing to allow the witnesses of the plaintiff in error to give their opinion as to whether or not the Marion Steam Loader was a safe machine and appliance for doing the work in which they were engaged at the time of the injury to the husband of the defendant in error. Clearly the weight or authority is that where the facts and circumstances under a given case can be

shown so that the jury may be in position to decide from those facts and circumstances, so produced, whether or not the machine so used was a safe one, expert evidence will not be permitted.

We further submit that the evidence in this cause shows that the facts and circumstances in this case were fully explained to the jury by competent witnesses, on behalf of both parties, that the various machines which are used for the purpose of skidding logs were explained and their operation, suitability and adaptability for the accomplishment of the work for which they were designed was discussed and placed before the jury; there were exhibited to the jury photographs of at least two of these machines; and that from the evidence introduced the jury was fully capable of arriving at the facts of whether or not the defendant exercised that degree of care which the law requires of it in selecting the appliances and machinery to perform the work in which it was engaged.

We submit that the action of the trial judge in refusing to allow the introduction of expert or opinion evidence will not be reviewed, unless the trial court abused his discretion.

The records in this cause clearly shows that

facts were submitted to the jurors, and that the jury was fully competent and capable of arriving at the fact as to whether or not the plaintiff in error was negligent in furnishing the Marion Steam Loader for the purpose for which it was being used at the time of the happening of the injury; and the record discloses the fact that the learned trial judge held this view when he refused the admission of this class of evidence. His ruling should not be reviewed on this appeal.

On the trial of this cause the plaintiff introduced evidence by a great number of witnesses, tending to show that the Marion Steam Loader was not commonly or generally used for the purpose of skidding logs in the manner in which the work was being done at the time of the injury to Harry Harkins.

Evidence on behalf of the plaintiff, now the defendant in error, tended to show that the Marion Steam Loader was a machine constructed, adopted and generally used for the purpose of loading logs, and that said machine was not constructed, or equipped, or a suitable appliance for the purpose of skidding logs as was being done in this case.

The defendant, now the plaintiff in error, produced several witnesses whose evidence tended to

show that the Marion Steam Loader was a machine commonly and generally used for the purpose of skidding logs.

The jury heard this evidence, and under the instructions of the court, must have found that the Marion Steam Loader was not in general use for the purpose of skidding logs. The trial court, in his refusal to grant plaintiff's in error motion for non-suit, and also for a directed verdict, stated at the conclusion of plaintiff's case that he was of the opinion that the plaintiff in error was negligent in furnishing this machine to its employees for doing the work which they were doing.

We submit that the evidence in this case clearly establishes a departure from custom; not only that, but that the departure was accompanied by greater hazard and peril to the employees in the use of the appliance or machinery.

The evidence clearly shows that the Marion Steam Loader, which was being used for the purpose of skidding logs by the plaintiff in error, at or near Bovill, Idaho, within a radius of five hundred feet, was not properly equipped, nor suitably or adapted for that purpose. That the use of said machine for skidding logs, as they were doing at this time and

place, increased the hazard and risk of the employees of said company. The evidence shows that had a proper appliance or machine been used that the logs being pulled down the hill-side could have, by the use of a haul-back line, been steadied in their course, and prevented from running without their course. The evidence further clearly shows that had a machine been used, which was properly equipped with a signal device, that it would not have been necessary to station parties along said line near the path in which the logs were traveling.

It was contended by the defendant in the lower court, and is contended by the plaintiff in error here that a departure from custom does not of itself establish negligence. Clearly the evidence in the case at bar establishes not only a departure from custom, but that said departure was accompanied by greater hazard and increased danger.

Labart on Master & Servant, Vol. 3, p. 2528, §939; lays down the rule as follows:

“It may be laid down as an undisputed proposition that, where the injury complained of was caused by an instrumentality or method, which, at the time of the accident, was in its normal condition, evidence going to show that such an instrumentality was or was not commonly used under similar circumstances by persons in the

same line of business as the defendant is always competent for the purpose of proving that he was or was not in the exercise of due care in adopting or retaining that instrumentality as a part of his plant."

Baird v. Reilly, 92 Fed. 884.

"Nor is it disputed that if the evidence is conflicting as to whether such machinery is in common and ordinary use, the question of negligence in using the machinery is not one of law but of fact for the jury."

Labatt's Master & Servant, Vol. 3 §939.

In the case of the American Locomotive Works v. White 205 Red. Rep., 260, the Circuit Court of Appeals for the Third Circuit in passing on this question says:

"The part that usage should play in controversies like the case before us has been much debated, and the decisions thereon have by no means been uniform. Confining ourselves for the present to the point now in issue, we state as our opinion that a servant may be permitted to prove the common usage of the business, when he charges the master with negligence in doing some act that departs from the usage; but the proof should be accompanied by evidence that the departure complained of has increased the danger. The increased danger may appear from the circumstances of the act in controversy, or (in a proper case) it may be shown by the direct testimony of witnesses. The question in most issues of negligence is whether the defendant has used ordinary care under the particular cir-

cumstances. To establish his case, the plaintiff must prove the circumstances; and if negligence appears prima facie the defendant may then reply to the charge of evidence that his conduct has accorded with the common usage of the business. Undoubtedly the plaintiff may offer evidence in rebuttal to show that the defendant's conduct was not in accord with usage, and if he may do this in rebuttal we cannot say that the trial court does not have the discretion to permit him to offer the evidence in chief."

Judge Fawcett of the Supreme Court of Nebraska, in passing on this question in the case of *Weed v. Chicago R. R. Co.*, 5 Feb., 623, 99 N. W. 827, says:

"Employers are not insurers. They are liable for the consequences, not of danger, but of negligence in methods, machinery and appliances in ordinary usage of the business "

26 Cyc., page 1108, also lays down the following rules:

"While not conclusive on the question of negligence, evidence is generally admissible in an action for personal injuries to show whether or not the master's machinery, appliances, ways and methods are such as are in ordinary and common use by others in the same business, but customary negligence, either on the part of himself or others is no defense to the master."

"The care which the law requires of a railroad company, respecting the safety of the place where work is to be performed by its employees

is ordinary care, such as prudent, intelligent, experienced men usually use under like circumstances to guard against dangers reasonably to be anticipated. It is not bound to use the best and safest appliances or guards, but, if it uses such as are customarily used under like circumstances, it discharges its duty."

Southern Pacific Co. v. Gloyd 138 Fed. 388, 70 C. C. A. 528.

"A master is bound to exercise only reasonable care with respect to machinery, appliances, or places to work; and the measure of such care is that ordinarily exercised by others in the same business."

Law v. Central District Printing & Tel. Co., 140 Fed. 559.

In the case of Kansas and Texas Coal Co., v. Brownlie, 60 Ark. 582, 31 S. W. 543, the court said:

"We know of no way of determining what ordinary care is except as ascertained of men of ordinary care and prudence engaged in the same business on their own account, and for their own profit and success are in the habit of doing."

"The rule that the master is not bound to supply the latest and best improvements for the use of his employees applies to electric appliances, it being sufficient for him to furnish such as are in general use, and generally regarded as reasonably safe."

Lancaster v. Central City Light & Power Co., 137 Ky. 355, 125 S. W. 739.

Thompson on Negligence, Supp. §3993, lays down the following rule:

“The master is not a guarantor of the safety of an appliance furnished for the use of his servants but his duty is discharged if he exercised ordinary care and furnishes appliances which the experience of the particular trade or business has sanctioned as reasonably safe.”

“The master is not required to furnish the best, the safest or the newest appliances or methods of operation, nor to adopt extraordinary or unusual safeguards against risks and dangers. The limit of his duty here is to exercise ordinary care to supply reasonably safe places, appliances and methods. The test of his discharge of this duty is the exercise of ordinary care to supply such places, appliances, and methods, of persons of ordinary intelligence and prudence commonly furnish in like circumstances.”

Williams Cooperage Co. v. Headrick, 159 Fed. Rep. 682.

Wash. etc. R. R. Co. v. McDade; 135 U. S. 554, 570; 10 Supt. Ct., 2044; 34 L. Ed, 235.

Southern Pac. Co. v. Seley, 152 U. S. 145, 153 Sup. Ct. 530; 33 L. Ed. 391.

Mississippi R. Logging Co. v. Schneider, 20 C. C. A. 390, 391, 74 Fed 195, 196.

We submit from the evidence introduced in this

case, and under the law as laid down by the court, that this cause was properly submitted to the jury. The evidence clearly shows that the plaintiff in error failed to exercise ordinary and reasonable care in the selection and the furnishing of the Marion Steam Loader for the purpose of skidding under the circumstances as shown to have existed in this case,

The defendant in error introduced a great deal of testimony from men of long experience in the handling of these machines, who have had experience with said machines. not only in this section of the country, but in practically every state in the Union where extensive logging operations are carried on. There evidence conclusively establishes the fact, and the jury so found, that the Marion Steam Loader was not a suitable machine or appliance for the purpose of skidding logs under the circumstances as shown in this case. Where evidence is conflicting the question is one for the jury, and we submit that this question was properly presented to the jury.

The plaintiff in error complains of part of the following instruction, found on page 178 of the Transcript:

“Nor does it necessarily follow that the method and device here used were improper because this particular accident might have been

avoided, if some other method or appliance or device had been used. "To explain,, suppose the defendant had employed some other method by which certainly this accident could not have happened; still that method might have been attended with danger of other accidents, that is, accidents of a different kind; as an illustration, if horses had been employed for hauling in these logs this particular accident of course would not have occurred; it couldn't have occurred in just this way. But the question would still remain whether this method is more hazardous (and unreasonably hazardous) than the method of skidding logs by the use of horses."

" So, referring to the matter of using a signal device and haul-back line, possibly this particular accident might have been avoided, but you would not be justified in concluding that this is an improper method or a negligent method simply or merely from the fact that you may conclude that this could have been avoided. The question stills remains for you to answer, namely: whether this method was more hazardous than the other referred to, namely: the haul-back." It seems that in using the haul-back line it is necessary, for instance, to draw logs by the use of temporary lines (I have forgotten just what the name was), to haul them in for some distance, to the main line. Is that process accompanied with danger? Are the dangers of that method greater or less than the dangers of this method? Now, I refer to these considerations in order to direct your attention to the rule which prevails in cases of this character, and in order also to impress you with its reasonableness. That rule is this, the duty of the employer. here the Potlatch Lumber Company, (and I state it to you in a general way, and then you will apply

it to the particular facts), the measure of the employer's duty is to exercise ordinary and reasonable care to supply the employee with appliances and places and methods of work which are reasonably safe, but not necessarily always the newest or safest appliances. Sometimes it is not definitely known whether a very new appliance is going to be safe or not. Not extraordinary safeguards, but such as men of reasonable intelligence and prudence, and possessed of due and ordinary regard for safety of life and limb, employ or would employ. Some men may employ one method and some another. Some men may think one method a little safer than another. It doesn't follow that either one is negligent because different methods are employed. The question is whether any of them are using a method or using a device which intelligent men, reasonably prudent men, who have ordinary and reasonable regard for the safety of others, are using. If they use such a method, that is, one that is reasonably adapted to protect from danger or against danger, then there is no negligence, even though some other man might employ another method, even though it is not entirely clear which is the better of the two. So your inquiry here should be, did the defendant, in employing the Marion loader, under the conditions under which it was employed, for the purpose for which it was used at that time, exercise such intelligence, prudence and regard for the safety of its employees as men of ordinary intelligence and prudence, and with regard for the safety of others, ordinarily employ and exercise? Now, if you should find the defendant was not negligent under those rules which I have laid down for you, your duty is at an end, and you shall return a verdict for the defendant. If, upon the other hand, you find it

was negligent, then you shall persue your inquiry further, and a necessary question is, whether or not Mr. Harkins assumed the risk of his employment at the time and under the circumstances under which the accident occurred."

In our opinion the instruction does no injustice to the plaintiff in error; it clearly states the law.

We submit that the instructions of the court must be considered as a whole; and that no sentence or disjointed statement of the court should be construed except in the light of the whole instruction. From a careful reading of the instructions submitted by Judge Dietrich in this cause, the fact is disclosed that the statement to which the plaintiff in error objects was not made by the judge, and that the statement which was made, similar to the one which it complains of was an explanatory statement.

This case having been submitted to the jury under proper instructions, and the jury having found on the issue in favor of the plaintiff, we respectfully submit that the judgement should be affirmed

Attorneys for Defendant in Error,
Res. and P. O. Add. Coeur d'Alene,
Idaho.

Service of the foregoing Brief of the Defendant
in Error, by the receipt of a true copy thereof, ad-
mitted this day of May, 1914.

.....
Attorney for Plaintiff in Error,
Res. and P. O. Add. Spokane, Wash.

No. 2374

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

POTLATCH LUMBER COMPANY

(a corporation),

Plaintiff in Error,

vs.

SUSAN HARKINS,

Defendant in Error.

Upon Writ of Error to the United States District Court of the District
of Idaho—Northern Division.

ADDITIONAL AUTHORITIES ON BEHALF OF PLAINTIFF IN ERROR.

I.

THE COURT ERRED IN DENYING THE MOTION FOR A NONSUIT.

See specification XI of brief of plaintiff in error.

The evidence of the widow of the deceased showed that the deceased was an experienced backwoodsman and logging man, and that for about three months before he went to work for plaintiff in error, he worked as fireman on a Marion loader, a machine

of the same kind that is claimed to have caused his death (Trans. pp. 122, 123).

It was shown by witnesses of defendant in error that, at the time of the accident, the deceased had been engaged with the plaintiff in error in the same kind of work in which he was engaged in at the time he met his death, for three or four months (Trans. pp. 41, 68).

The deceased, therefore, at the time of the accident, was thoroughly acquainted with the characteristics and manner of operation of the machine in question, and was thoroughly aware of the fact that it had no haul-back, and that, therefore, if a log should jump or rush, the machine would be unable to control the log.

Under these circumstances, the deceased assumed the risk of injury from the very kind of accident which caused his death, and the motion for a non-suit should have been granted.

Southern Pacific Co. v. Seley, 152 U. S. 145;

Bush v. Wood, 8 Cal. App. 647;

Limberg v. Glenwood Lumber Co., 127 Cal. 598;

Long v. Coronado R. R. Co., 96 Cal. 269;

Sweeney v. Central Pacific R. R. Co., 57 Cal. 15;

Malone v. Hawley, 46 Cal. 409;

McGlynn v. Brodie, 31 Cal. 376.

The complaint alleges that while the deceased was engaged in the work of assisting in the skidding of logs,

“the said defendant, its employees, managers, and agents in charge of said work, carelessly, negligently, wrongfully and without regard to the safety of the employees and without regard to the safety of said Harry Harkins, pulled and hauled the said logs on to and against a tree, and negligently and carelessly and without regard to the safety of said Harry Harkins stopped said Marion loading machine and allowed the said log to run and be dragged on to and against a tree, knocking said tree over on to the said Harry Harkins, and the said Harry Harkins was thereby mortally wounded, of which injuries the said Harry Harkins died on the 9th day of November, A. D. 1911” (Trans. pp. 5-6).

It thus appears that the particular negligence which caused the death of the deceased, was the improper management of the log by the employees of the plaintiff in error.

The complaint, it is true, alleges that the machine with which the skidding was being done, was an unsuitable machine for such work.

But, to entitle an employee to recover for injuries suffered in the course of his employment by reason of a defective machine, the machine itself, and not the negligence of the fellow employees, must have been the proximate cause of the accident.

Vizelich v. Southern Pacific Co., 126 Cal. 587.

Even though the machine were defective, if the injuries of the deceased were caused proximately by the negligence of his fellow employees, the plaintiff in error is not liable.

Trewatha v. Buchanan Gold Mining & Milling Co., 96 Cal. 494.

II.

THE COURT ERRED IN REFUSING TO ALLOW PLAINTIFF IN ERROR TO ASK CERTAIN WITNESSES WHETHER THE MACHINE IN QUESTION WAS A REASONABLY SAFE MACHINE FOR THE PURPOSES FOR WHICH IT WAS BEING USED.

This point is involved in specifications of error numbered III, VII, VIII, IX and X.

In each instance the witness who was asked the question, was thoroughly familiar with the machine in question, and with the work of skidding logs, and was, beyond question, competent as an expert, to state whether or not the machine in question was a reasonably safe machine for the work in which it was being used.

The following authorities sustain the right of plaintiff in error to have that particular question answered by each of the witnesses.

Greenleaf v. H. & A. Works, 78 Cal. 610;

Bundy v. Sierra Lumber Co., 149 Cal. 772.

Respectfully submitted,

EDWARD J. CANNON,

GEORGE M. FERRIS,

CHARLES E. SWAN,

WALTER H. LINFORTH,

Attorneys for Plaintiff in Error.

No. 2374

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

POTLATCH LUMBER COMPANY

(a corporation),

Plaintiff in Error,

vs.

SUSAN HARKINS,

Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

*To the Honorable William B. Gilbert, Presiding
Judge, and the Associate Judges of the United
States Circuit Court of Appeals, for the Ninth
Circuit:*

Plaintiff in error respectfully asks a rehearing of this cause and specifies the following as the grounds upon which the rehearing is asked, viz.:

That the trial court erred in refusing to permit various witnesses called by plaintiff in error to give the opinion evidence hereinafter referred to, *or* the trial court erred in refusing to grant the motion

made on behalf of the plaintiff in error for a directed verdict, on the ground the decedent assumed the risk, as hereinafter set forth, and that the judgment of affirmance of this court, upholding these rulings, is incorrect.

1. Upon the trial the plaintiff in error called five witnesses, viz.: E. M. Rogers, R. M. Hart, T. P. Jones, Norris B. Murphy and Michael J. Ward. It proposed to prove by each of them that, in their opinion, the Marion steam loader, by which the work was being done at the time of the happening of the accident to decedent, was a reasonably safe machine for the purpose for which it was then being used, viz.: skidding in logs within a radius of 500 feet, without a signal line or a haul-back line (see specifications of error 3, 5, 7, 8, 9 and 10, pages 5, 6, 7, 8 and 9 of opening brief).

The following question, propounded to the witness Rogers, will illustrate the rulings above referred to:

“Q. Now, I will ask you to state whether or not the use of the machine, of the Marion steam loader, for hauling in these logs, under the circumstances that I have related, is or is not a reasonably safe machine for that purpose?”
(Trans., page 128)

the circumstances under which the Marion steam loader was being used having, theretofore, been related.

2. After the introduction of all the evidence in the case, the plaintiff in error moved the court for a directed verdict in its favor on the ground, among

others, that the deceased, in entering upon and remaining in the employ of the plaintiff in error in the work in which he was engaged, assumed all risks and dangers incident to the operation of the steam loader, in the manner in which it was being operated, at the time of the happening of the accident. This motion was denied by the court, and this ruling is assigned as error (see specifications of error 11 and 12, pages 9 and 10, opening brief).

It is most respectfully submitted these rulings are contradictory and inconsistent. *Both* cannot be correct. If the steam loader was *obviously* unsafe for the doing of the particular work in which it was engaged when decedent met his death, then the trial court was correct in excluding the *opinion* evidence. On the other hand, if it was obviously unsafe, then it erred in denying the motion for a directed verdict, for in such event decedent assumed the risk, and the defendant in error cannot recover.

As said by Judge Wallace, of the Circuit Court of Appeals, in *Henion v. New York N. H. & H. R. Co.*, 79 Fed. Rep. 903:

“When the facts can be placed before a jury and they are of such a nature that juries generally are just as competent to form opinions in reference to them, and draw inference from them, as witnesses, there is no occasion to resort to opinion evidence.”

If this enunciation of the law is correct, and we do not think it can be successfully challenged, then the converse of the proposition must likewise be

correct, viz.: that if the facts are of such a nature that juries are *not* generally as competent to form opinions in reference thereto, and draw inferences therefrom as experts, then there *is* occasion to resort to opinion evidence.

What was the theory of the trial court in rejecting this opinion evidence? It must have been the facts and circumstances relating to the safeness or unsafeness of this machine, in the doing of the particular work in question, *were* of such a nature that the jury *was just as competent* to form an opinion on the subject as the experts. In other words, the trial court must have concluded the jurors, with the photograph of the machine before them, and a description of its operation, as detailed by the witnesses, were in a position to determine whether or not the machine in question was reasonably safe for the doing of this particular work. The moment it so concluded, we contend, *in effect*, it decided the decedent assumed the risk, and no recovery can be had because, of necessity, *the facts testified to by the witnesses relating to the safeness or unsafeness of the machine, were all known to the decedent at and prior to the time of the happening of the accident, which resulted in his death.* He surely was in as good, if not a better position, than the jury, to know whether the machine was safe or unsafe in the manner in which it was then being used.

It is not claimed by the defendant in error, there was any hidden defect in the steam loader—in fact, it was not even pretended there was *any* defect in

the machine itself, but the case is based upon the single proposition that the machine was unsuitable and unsafe for skidding in logs a distance of 500 feet, in that it was not provided with a signal line or a haul-back line. No one having eyes could help seeing the machine was not equipped with either. Decedent knew, prior to the happening of the accident in question, it was not equipped with either. Decedent knew, at the time of the happening of the accident in question—in fact, for two weeks prior thereto—it was being used for the purpose of skidding in logs without either a signal line or haul-back line. If its use for the doing of this kind of work, without either a signal line or a haul-back line, or both, made the machine unsuitable and unsafe, no one engaged in this kind of work could have helped but know it. If the decedent knew it and continued at his work, he surely assumed the risk, and no recovery can be had in this action. If the jury, with just the photograph of the machine before it, and a description from the witnesses of the way it was operated, were, in the language of Judge Wallace, just as competent as experts to form opinions as to its safeness or unsafeness, then we ask was not the decedent in a *better* position than the jury to know this fact? Instead of the photograph of the machine which the jury had before it, he had the machine itself before him. Instead of the description of its operation, as outlined to the jury by the witnesses, decedent had before his own eyes the actual operations. Of course, he knew no haul-back line

or signal line was being used in connection with the machine in the doing of this work. He could see, and, of course, knew, the character and slope of the hill down which the logs were being skidded in, and if the jury could determine with reasonable certainty from being *told* how the machine was operated, and how the work was being done, that the machine was unsuitable and unsafe, why couldn't the decedent, who *witnessed* the entire operations? His opportunity for knowing and determining this fact was far better than that of the jury.

The decedent was a man forty years old, and from his different occupations, as shown by the record, must have been possessed of at least ordinary intelligence. Work of this character is attended with more or less danger. Any one possessed of ordinary intelligence would know this fact. The decedent had had experience in the woods and he was thoroughly acquainted with the Marion steam loader. He had been doing the work of scaling (Trans., page 56), and also had been fireman (Trans., page 123). He had been working there with this particular crew about two months or longer, and had been working, *skidding in logs with this machine* about two weeks (Trans., page 41).

If it was *obviously* dangerous to use this steam loader without a signal line or a haul-back line for skidding in logs a distance of 500 feet, down a hill with a ten per cent incline, surely the decedent, with his experience, knew, or should have known this fact. We assume the jurors were not skilled in the

doing of this particular work, and if sitting upon a trial lasting three days, and *listening* to the method of the doing of the work, they were competent to determine and decide that the machine in question was unsafe and unsuitable for the purpose of its then use, how can it be said the decedent, with his experience and opportunity of observation, was not *more* competent to determine this question than the jurors? It was his duty, under the law, to observe that which was going on about him, and the law will not permit one to close his eyes to danger which is open and obvious.

As said by Mr. Justice Shiras in *Southern Pacific Co. v. Seley*, 152 U. S., page 154:

“It is for those who enter into such employment to exercise all that care and caution which the perils of the business in each case demand. The perils in the present case, arising from the sharpness of the curve, *were seen and known*. They were not like the defects of unsafe machinery which the employer has neglected to repair, and which his employes have reason to suppose is in a proper working condition. *Everything was open and visible, and the deceased had only to use his senses and his faculties to avoid the dangers to which he was exposed.*” (The italics are ours.)

As said by the court in *Glascock v. Central Pacific R. R. Co.*, 73 Cal. 141:

“If he looked, he saw; and having age and faculties to understand the dangers, *is charged with a knowledge of them*, and was bound to act upon that knowledge as a prudent and cautious man would under the circumstances.”

As said by the Supreme Court in the case of *Hall v. Clark*, 163 Cal. at page 396, quoting from *Limberg v. Glenwood Lumber Company*, 127 Cal. 600:

“He cannot be allowed to close his eyes to the danger and thereafter to say, ‘I did not know it was dangerous’.”

If the danger was open and obvious, it must be, the decedent assumed the risk. That the work was going on without the use of a signal line or haul-back line, was obvious. That the logs were being skidded in for a distance of 500 feet and less, was also obvious. That they were being skidded in down a hill with a ten per cent incline, was also an obvious fact. That there was danger of a log jumping out of its course, was also obvious to any person engaged in the work, possessed of ordinary intelligence and of mature years. It would seem that everything which tended to make the work dangerous, or the use of the steam loader in the manner in which it was being used, unsuitable or unsafe, was open and obvious. The decedent's knowledge and opportunities of knowledge as to the safeness or unsafeness of this particular machine, for the doing of the work in question, without the use of a signal line or haul-back line, was to say the least, *equal* to that of plaintiff in error, or any one else connected with the doing of this particular work.

As was said in the early case of *McGlynn v. Brodie*, 31 Cal. 379:

“Where a party works with, or in the vicinity of a piece of machinery insufficient for the purposes for which it is employed, or for any reason unsafe, with a knowledge *or* means of knowledge of its condition, he takes the risk incident to the employment in which he is thus engaged, and cannot maintain an action for injuries arising out of accidents resulting from such defective condition of the machinery. This is the principle established by all of the cases.”

In *Sanborn v. Madera Flume & Trading Co.*, 70 Cal. 266, it is said:

“When a party works with, or in the vicinity of, a piece of machinery insufficient for the purpose for which it is employed, or for any reason unsafe, with a knowledge *or* means of knowledge of its condition, he takes the risk incident to the employment in which he is thus engaged, and cannot maintain an action for injuries sustained, arising out of accidents resulting from such defective condition of the machinery.”

In *Fisk v. Central Pacific R. R. Co.*, 72 Cal. 43, it is said:

“Where the servant has *equal* knowledge with the master of the danger incident to the work, he takes the risk upon himself if he goes on with it.”

If on the other hand it was not *obviously* unsafe and dangerous to use the machine without a haul-back line or signal line, then the trial court erred

in excluding the opinion evidence. Where the facts are of such a nature that juries are *not* generally as competent to form opinions in reference thereto, and draw inferences therefrom, as experts, then opinion evidence is admissible. If here the facts *were* of such a nature that the jury was as competent to pass upon the question of the fitness or unfitness of this machine, as the experts, then the rulings of the trial court excluding the opinion evidence, was correct—not otherwise—but the moment this query is answered in the affirmative, then it must be, the ruling denying the motion for a directed verdict was erroneous, because the decedent, not only had the opportunity of knowing, but, of necessity must have known, *each fact* connected with the doing of the work in question that was submitted to and laid before the jury from which it concluded the machine in question was unsuitable and unsafe for the doing of this particular work.

In the briefs of the plaintiff in error, these two rulings were not contrasted in the manner set forth in this petition, but upon the oral argument counsel for plaintiff in error contended as now, these rulings are inconsistent and cannot be reconciled.

In the opinion, written by presiding Justice Gilbert, speaking of the contention of plaintiff in error that decedent assumed the risk, it is said:

“As to assumption of risk, it does not appear from the evidence that the deceased so appreciated the risk of his employment that the case should have been taken from the jury. The

deceased had been working as a carpenter about the logging camp, and about two weeks before the accident he had been assigned to work at skidding logs with the Marion steam loader. *Prior to that time, he had done no work with that kind of machine.* The court, under proper instructions submitted to the jury the question whether he assumed the risk." (The italics are ours.)

The record disclosed decedent had worked to some considerable extent upon and about Marion steam loaders. According to the uncontradicted testimony he had been working on a Marion steam loader as engineer about three months (Trans., page 123); he had worked as a scaler off and on for about two years (Trans., pages 56, 122); he had worked with the very crew that was operating this particular steam loader at the time of the happening of the accident, for a period of about two months immediately prior to the happening of the accident (Trans., page 41), and for about two weeks immediately prior thereto he had been engaged in the same kind of work he was doing at the time he met his death (Trans., page 41). Moreover, he had been following the logging business on his own account for quite a long time (Trans., page 122).

Aside from this, we respectfully submit the physical facts, each and every one of them, clearly demonstrate any man of mature years and possessed of ordinary intelligence, could not have failed to appreciate the risk of his employment. The fact that the jury were able to appreciate the risk, and place

the blame therefor, clearly demonstrates, as it seems to us, the decedent was in a *better* position to appreciate whatever risk there was than the jury. If there had been any *hidden* defect in the Marion steam loader, unknown to decedent, and which was brought to the attention of the jury upon the trial, as a result of which the accident happened, we could readily perceive how it might be claimed and said, in such a case it did not appear that the decedent had so appreciated the risk that the case should have been taken from the jury, but in a case like this, where the jury are not told, and do not know a single fact connected with the operation of the Marion steam loader that was not known to the decedent, we respectfully maintain it cannot be said the action of the trial court in denying the motion for a directed verdict, based on this ground, was correct. The moment it is conceded the jury was competent to pass upon this question from the testimony introduced describing the operation of skidding in the logs, that moment, it seems to us, it must be conceded the decedent assumed the risk, for he knew *at least* as much of the operation from actual observation, as the jury did from a description of it as told by the witnesses.

If we are correct in what we have stated, as to the physical facts surrounding the doing of the work at the time of the happening of the accident, and we respectfully submit we are, then we main-

tain the trial court should have determined, as a matter of law, the decedent assumed the risk, and the question should not have been left to the jury. There is no reason shown by the record *why* the decedent did not *appreciate* the risk. He was a man of mature years, possessed of more than ordinary intelligence, and whatever risk there was attached to the work in the way it was being done, was open and obvious to any one who cared to use his natural faculties. If, as declared in many well considered cases, where everything was open and visible "the decedent had only to use his senses and his faculties to avoid the dangers to which he was exposed", then we contend whether or not he appreciated the risk of his employment was one of law for the court, and not of fact for the jury.

We respectfully submit a rehearing should be granted plaintiff in error.

Dated, San Francisco,

October 26, 1914.

EDWARD J. CANNON,

GEORGE M. FERRIS,

CHARLES E. SWAN,

WALTER H. LINFORTH,

*Attorneys for Plaintiff in Error
and Petitioner.*

CERTIFICATE OF COUNSEL.

We hereby certify that in our judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

EDWARD J. CANNON,

GEORGE M. FERRIS,

CHARLES E. SWAN,

WALTER H. LINFORTH,

*Attorneys for Plaintiff in Error
and Petitioner.*

APPENDIX.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 2374

Potlatch Lumber Company (a corporation),
Plaintiff in Error,

vs.

Susan Harkins,

Defendant in Error.

[OPINION, U. S. CIRCUIT COURT OF APPEALS.]

Upon Writ of Error to the United States District Court of the
District of Idaho, Northern Division.

Before GILBERT and ROSS, Circuit Judges, and
WOLVERTON, District Judge. GILBERT, Circuit
Judge.

The defendant in error recovered a judgment against the plaintiff in error for damages on account of the death of her husband, who was killed while employed by the plaintiff in error in skidding logs. The crew of which the deceased was a member was engaged in skidding logs with a Marion steam loader. The deceased with two others had dragged

the cable with which the logs were skidded out about 400 feet to a point where they attached the cable to a log. The men, under the direction of the foreman, stationed themselves at intervals alongside and near the route the log was to travel. This was done for the purpose of signalling to the engineer. The timber was on a hillside with a grade of about ten per cent. As the log was being hauled in, it started to run, and in its course it struck and upset a tree which fell upon the deceased. Negligence is alleged in that the Marion steam loader was not suitable or adapted to be used as a skidding machine, and was not equipped with the proper appliances commonly used on skidding machines, and was a dangerous, unsafe machine for performing the work of skidding logs, in that it was not provided with a whistle cord or any device for the purpose of giving signals, and was not provided with a haul-back line.

Error is assigned to the denial of the motion of the plaintiff in error for an instructed verdict in its favor, on the ground that there was no proof that the death of the deceased was caused by the negligence of the plaintiff in error, that the Marion steam loader, was a reasonably safe machine, such as was in general use throughout the country and that the deceased assumed all risks and dangers incident to the operation thereof. It is now argued that the evidence shows conclusively that the machine so used, and the methods adopted at the

time of the accident were the same as those adopted and used under similar circumstances and conditions all over the country, and that common usage is the supreme test of due care in the selection of appliances and the adoption of methods for conducting one's business. But this argument ignores testimony which tended to prove that while the machine was in general use for loading logs on cars, it was not used for skidding purposes, and that increased hazard attended its use for that purpose. We are not convinced, therefore, that the court below erred in denying the motion, there being testimony to go to the jury tending to show the negligence of the plaintiff in error, testimony to the effect that the Marion steam loader was not commonly or generally used for skidding purposes, that it was a loading machine and intended to be used only in loading on a car, logs lying within a radius of 75 feet therefrom, and by means of a short cable. There was testimony of men of experience in logging that they had never seen the machine used for skidding purposes; that when so used, there was no way of giving signals except by shouting or waving the hand; that a machine used for skidding is equipped with a whistle cord for signalling purposes and a haul-back line; that such a machine has two drums, one for the cable which draws the log, the other for the haul-back line, and that the haul-back line is used for two purposes, one to carry the cable out into the timber, the other to hold the log in its course as it is being drawn by the cable.

There was evidence that if a haul-back line had been used in drawing the log which occasioned the death of the deceased, the log would have been held to its course and the accident would not have occurred.

It is true that employers are not insurers and that the party charging negligence does not prove it merely by showing that the machine is not in common use, for it may be that the machine used is safer than those which are in common use, but it is competent to show that the machine is unusual, and at the same time more dangerous than those in common use. Although there is conflict in the decisions, the better doctrine is well stated by the Circuit Court of Appeals for the Third Circuit in *American Locomotive Co. v. White*, 205 Fed. 260, as follows: "The part that usage should play in controversies like the case before us has been much debated, and the decisions thereon have by no means been uniform. Confining ourselves for the present to the point now in issue, we state as our opinion that a servant may be permitted to prove the common usage of the business, when he charges the master with negligence in doing some act that departs from the usage; but the proof should be accompanied by evidence that the departure complained of has increased the danger. The increased danger may appear from the circumstances of the act in controversy, or (in a proper case) it may be shown by the direct testimony of witnesses."

See also *Chicago & Great Western Ry. Co. v. Egan*, 159 Fed. 40; *McGeehan v. Hughes*, 217 Pa. 121; *Giraudi v. Electric Imp. Co.*, 107 Cal. 120.

As to assumption of risk, it does not appear from the evidence that the deceased so appreciated the risk of his employment that the case should have been taken from the jury. The deceased had been working as a carpenter about the logging camp, and about two weeks before the accident he had been assigned to work at skidding logs with the Marion steam loader. Prior to that time, he had done no work with that kind of machine. The court, under proper instructions submitted to the jury the question whether he assumed the risk.

It is assigned as error that the court sustained the objection to the question asked the witness Younkin on cross-examination: "As a matter of fact, they were doing that work there that morning in the most practicable and customary and usual manner under the circumstances. Isn't that true?" The objection was sustained on the ground that the question was leading, and the court said that he would not permit either side to ask leading questions of the witness, inasmuch as he was then the foreman in the employment of the plaintiff in error, and was the son-in-law of the defendant in error. We need not discuss the ground on which the ruling was made. We think there was no error for the reason that the question called for the opinion of the witness as to whether or not the method of doing

the work was the most "practicable". In 17 Cyc 56, it is said: "The issue of negligence can in most cases well be determined by the judgment of a jury and the inference, conclusion, or judgment of witnesses is rejected. This rule has been applied, for example * * * as to conduct; as whether it was cautious, dangerous, in the line of duty, necessary, negligent, proper, prudent, reasonable, professionally skillful, safe, usual, or unusual, and whether such conduct constituted good management." Decisions in point are *Atchison, T. & S. F. R. Co. v. Myers*, 63 Fed. 793; *Hunt v. Kile*, 98 Fed. 49; *Seese v. Northern Pacific R. Co.*, 39 Fed. 487; *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551; *Henion v. New York, N. H. & H. R. Co.*, 79 Fed. 903.

The foregoing considerations and authorities are applicable also to the contention that the court below erred in sustaining objections to questions propounded to witnesses as to whether or not the machine known as the Marion steam loader was a reasonably safe machine for the purpose of skidding logs within a radius of 500 feet.

At the close of the instructions to the jury, counsel for plaintiff in error excepted to that portion thereof "which stated that the question for the jury to decide was whether the use of the Marion steam loader as it was being used at the time of this accident was more hazardous than if used with a haul-back." The court expressed his understand-

ing that the charge had not been so given, and in fact it had not. The court said: "To explain, suppose the defendant had employed some other method by which certainly this accident could not have happened, and yet that method had been attended with danger of other accidents, that is, accidents of different kinds; as an illustration, if horses had been employed for hauling in these logs, this particular accident, of course, would not have occurred; it could not have occurred in just this way; but the question still remains whether this method is more hazardous, and unreasonably hazardous, more hazardous than the method of skidding the logs by the use of horses. So, referring to the matter of using a signal device and haul-back line, possibly this particular accident might have been avoided. But you would not be justified in concluding that this is an improper method or a negligent method, simply or merely from the fact that you may conclude that this accident could have been avoided. The question still remains for you to answer, namely, whether this method was more hazardous than the other referred to, namely, the haul-back." We find no error in the instructions so given, especially when it is considered in the light of the other instructions which covered all questions involved in the case. It was necessary for the court to submit to the jury the question whether the machine in use was unusual, and

whether it was more hazardous than the machine equipped with a haul-back line. We find no error.

The judgment is affirmed.

(Endorsed): Opinion filed October 5, 1914.

(Signed) FRANK D. MONCKTON, Clerk.

